STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

ILLINOIS BELL TELEPHONE COMPANY	**)**	
	)	**Docket No. 01-0614**
Filing to Implement Tariff Provisions Related to	**)**	
Section 13-801 of the Public Utilities Act	**)**	

BRIEF ON EXCEPTIONS OF AMERITECH ILLINOIS

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Dated: April 1, 2002

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Illinois Bell Telephone Company (" Ameritech Illinois" or "the Company") hereby submits its Brief on Exceptions to the Proposed Order issued by the Administrative Law Judge on March 8, 2002 ("Proposed Order"). Suggested replacement language and findings supported by this Brief on Exceptions are set forth in the attached Exceptions.

I. INTRODUCTION AND SUMMARY OF POSITION

A. INTRODUCTION

This proceeding is unique in that the Commission is not called upon to act in its capacity as a policy maker. Rather, it is called upon to interpret and apply the new legislation contained in Section 13-801 of the Public Utilities Act ("PUA"). In this capacity, the Commission must act more like a court of law charged with the obligation to interpret the law in an objective manner. The Commission's role in interpreting and applying Section 13-801 in this proceeding should, therefore, be guided by three principles. First, the Commission should apply "plain meaning" of the words in Section 13-801. If the meaning of the statute is unambiguous, its plain meaning must be followed. Second, where the meaning of the statute is not clear, the Commission should employ the rules of statutory construction established under Illinois law. The law has established rules that assist in the interpretation of Illinois statutes and these rules must be applied consistently across all types of legislation. Third, the Commission should interpret Section 13-

801 in a manner consistent with, and "not preempted by" federal law. This third principle applies independently as a matter of federal law, but also flows from the plain meaning of Section 13-801(a) and from the rules of statutory construction which require Illinois courts and administrative agencies to develop constitutionally valid interpretation of state statutes. The Proposed Order fails to follow these three principles.

In several places, the Proposed Order ignores or misconstrues the plain meaning of the statute. For example, the Proposed Order would permit carriers to resell the "network elements platform" to other carriers, despite the plain requirement in Section 13-801(d)(4) that the platform be used by a carrier only to provide service "to its end users or pay phone telephone service providers". Similarly, Section 13-801(a) requires that the law be interpreted in a way "not inconsistent with" and "not preempted by" federal law. Rather than give effect to this limiting language, the Proposed Order concludes that this is statutory authorization to ignore the conflicts between federal law and state law in this highly regulated area. As a result, the Proposed Order erroneously concludes that "any and all combined network elements" in the Ameritech Illinois network must be offered to CLECs as a "platform" without any regard to the "necessary and impair" test established under federal law. This is so even though the FCC Rule 51.317(b)(4) expressly requires a state Commission to comply with that test.

The Proposed Order also gets it wrong when it comes to interpreting Section 13-801 pursuant to the Illinois rules of statutory construction. It is well-established in Illinois that when a statute employs a word which is not defined, but which has otherwise has "well known legal significance", then absent any contrary expression, "courts assume the legislature intended the words to have that meaning". People v. Warren 173 Ill 2d 348, 370 (1996). The term "platform" is not defined in Section 13-801. Rather than defer to the "well known" meaning of

the term (which is limited to local loop, switch and interoffice transport), the Proposed Order concludes that the term "platform" is completely unlimited and defines it to include "any and all combined network elements". (Prop. Order, pp. 30-31).

Based on this critical error, the Proposed Order wrongly concludes that a "splitter" must be offered by Ameritech Illinois as part of the "platform" (Prop. Order, pp. 29-32); wrongly concludes that Ameritech Illinois must provide data (i.e., non-switch) circuits as part of a "platform"; and wrongly concludes that the local switch which Ameritech Illinois uses to provide dial tone to an Ameritech end user can become part of the "platform" when Ameritech Illinois terminates to that end user an intraLATA toll call made over the "platform". (Prop. Order, pp. 138-39).

The Proposed Order also ignores the well-established rule of statutory construction which requires it to interpret Section 13-801 to be constitutionally valid. Villegas v. Board of Fire & Police Comm's, 167 Ill. 2d 108, 124 (1995). For example, the Proposed Order interprets Section 13-801(d)(4) to "relegate[ ] the concept of unbundling to the scrap heap of time" (Prop. Order, p. 30) – even though unbundling is an essential element of the statutory framework adopted by the United States Congress (i.e., "necessary and impair" test) that expressly applies to the States. The Commission should conclude that, consistent with federal law and consistent with rule of statutory construction that favors constitutionally valid interpretations of state law, the "necessary and impair" test applies to Section 13-801.

The failings of the Proposed Order discussed in this Brief center primarily on the failure to follow these three important principles. Ameritech Illinois respectfully requests the Commission to revise the Proposed Order so that it properly applies the plain meaning of the

terms within Section 13-801; so that it properly applies the rules of statutory construction under Illinois law; and so that it properly recognizes the federal law which must be followed in Illinois.

B. SUMMARY OF POSITION

1. Collocation of "Necessary" Equipment

The Proposed Order concludes that the word "necessary" should be removed from Ameritech Illinois' collocation tariff because it does not appear in Section 13-801(c). This conclusion should be rejected because it fails to apply the mandate in Section 13-801(a) that the statute be interpreted in a manner which is "not inconsistent with" and "not preempted by" federal law. Under federal law, the "necessary" standard clearly applies to equipment that a CLEC wishes to collocate in an ILEC central office. Section 13-801(c) need not, and should not, be interpreted as mandating the adoption of a collocation standard more stringent than that imposed by federal law. Such an interpretation completely disregards the rule of statutory construction that requires that "an interpretation which renders a statute unconstitutional or otherwise invalid should be discarded." Northwest Airlines, Inc. v. Department of Revenue, 295 Ill. App. 3d 889, 893 (1st Dist., 1998). Since federal law requires the "necessary" standard, a state law that ignores that standard would be preempted by the operation of the Supremacy Clause of the United States Constitution.

2. Cross Connects and Line Splitting

The Proposed Order concludes that Ameritech Illinois is required to provide CLECs with splitters as part of the UNE Platform. This conclusion is unsupported by Section 13-801 and is directly contrary to Orders of the FCC and this Commission which make it clear that an ILEC has no legal obligation to provide splitters to CLECs under any circumstances. As in the case of

its finding on collocation, the Proposed Order improperly goes out of the way to interpret Section 13-801 in a manner that would render it invalid as a violation to the Supremacy Clause. The Proposed Order reaches its conclusion through a remarkably strained interpretation of Section 13-801(d)(4) as requiring the Company to provide a "platform" consisting of "any and all network elements". This interpretation of Section 13-801(d)(4) is (i) directly contrary to the well-established definition of the term "platform" under Illinois and federal law, which limits it to a combination of the local loop, switching and shared transport (ii) makes no sense in light of several other provisions of Section 13-801 which make it clear this General Assembly could not have intended to define the term "platform" in the manner suggested by the Proposed Order; and (iii) violates federal law which requires States to comply with the "necessary and impair" test before finding that a network element is one to which a CLEC is entitled access – something that the Proposed Order did not do.

3. "Ordinarily Combined"

In construing Section 13-801(d)(3), which requires that Ameritech Illinois combine for CLECs the UNEs that it "ordinarily combines" for itself, the Proposed Order rules that if Ameritech Illinois combines a sequence of UNEs *more than once*, then it meets the "ordinarily combines" standard. The Proposed Order effectively reads the word "ordinarily" out of Section 13-801(d)(3), thereby imposing a combining obligation which goes far beyond that established by the General Assembly. "Ordinarily combines" is a term of art which is most reasonably construed to refer to UNEs combined to provide services for residential and small business customers on a mass market basis. This interpretation is supported by several factors, including (i) the meaning of the phrase as it was commonly understood at the time that Section 13-

801(d)(3) was enacted; (ii) the common-sense meaning of the term as applied in the context of telephony; and (iii) a proper consideration of the goals of promoting competition and investment in facilities and job creation in Illinois. The Proposed Order fails to adequately address these factors in construing Section 13-801(d)(3).

4. Point to Point Data Circuits

The Proposed Order erroneously concludes that, pursuant to Section 13-801(d)(3), Ameritech Illinois must combine for CLECs unbundled loops and dedicated transport for the provision of "private line" or "point-to-point" data service. There is no such obligation because, under Section 13-801(j), nothing in Public Act 92-22 can be construed to require the substitution of a "combination of network elements" for "special access services" (220 ILCS 5/13-801(j)) and "special access", as defined by the Commission, is synonymous with private line service. Moreover, an interpretation of the statute as requiring the Company to provide new "point-to-point" data circuits as UNEs is inconsistent with (i) a proper definition for the term "ordinarily combines"; and (ii) the highly competitive nature of the market for high speed facilities and dedicated transport services in Illinois. The Proposed Order also errs to the extent that it requires Ameritech Illinois to convert existing, non-local private line circuits to existing combinations of loop and dedicated transport UNEs without reference to the local usage test mandated by the FCC for such conversions in its Supplemental Order Clarification.

5. EELs Tariff

The Proposed Order errs by rejecting the provisions of Ameritech Illinois' proposed EELs tariff which (i) limit the new EEL combinations to circuit switched or packet switched applications and (ii) defines a new EEL as terminating in a CLEC's collocation area. These

requirements are integral to the definition of an EEL in the Draft I2A, which identified the only new EEL combinations that Ameritech Illinois is required to offer under Section 13-801(d)(3).

Ameritech Illinois also takes exception to the Proposed Order's decision to adopt Staff's proposed EELs tariff, which improperly conflates the requirement to provide new EEL combinations with the separate obligation to allow for conversions of special access and private line circuits to existing combinations of loop and dedicated transport UNEs. Terms and conditions related to the latter requirement are properly addressed by the Company in a tariff (Section 19) separate from the tariff (Section 20) which deals with new EEL combinations.

6. Local Usage Test

The FCC has clearly defined the rules for conversion of special access circuits to UNEs in the Supplemental Order and Supplemental Order Clarification – the "local usage test". The Proposed Order recommends that the Commission immediately initiate a proceeding to review the continued applicability of "local usage test" in Illinois. This recommendation should be rejected because the Commission has no jurisdiction to supersede the "local usage test" mandated by the FCC, a fact which the Commission has expressly recognized in numerous orders.

7. Points of Interconnection (POI)

According to the Proposed Order, when a CLEC exercises its right to establish a single POI architecture under Section 801(b)(1)(B), it can do so without bearing any part of the significant additional transport costs it imposes on Ameritech Illinois. This finding must be rejected for at least three reasons. First, contrary to an express finding in the Proposed Order, federal law and FCC Rule 51.703(b) do not prohibit Ameritech Illinois from charging transport

to a distant POI. Second, the Proposed Order is inconsistent with this Commission's past rulings that allocate Ameritech Illinois' costs to entities that cause the costs. Third, it is inconsistent with this Commission's holding in the Level 3 Arbitration.

8. General Terms and Conditions

Ameritech Illinois agrees with most of the conclusions of the Proposed Order on the General Terms and Condition issues. One aspect of the Proposed Order, however, should be changed, i.e., the finding that Ameritech remove the phrase 'to the extent not inconsistent with' from its reservation of rights language in the tariff. This language makes it clear that the Company offers UNEs as required by federal law and as required by state law, to the extent is it consistent with federal law. This is completely correct under Section 13-801(a), which provides that an ILEC's obligations are limited to those which are "not inconsistent with" and "not preempted by" federal law. Ameritech Illinois' tariff language properly reflects this requirement that the state law be interpreted consistent with federal law and accurately reflects its legal obligations under the Supremacy Clause of the United States Constitution.

9. ULS-ST Issues

The ULS-ST section of the Proposed Order makes three holdings that violate the law: (1) that the UNE Platform can be resold by CLECs to other carriers; (2) that an Ameritech *terminating* switch becomes part of the "network elements platform" when it terminates a toll call to an Ameritech end user, thus allowing a CLEC to avoid paying Ameritech Illinois' switched access rate for local switching; and (3) that the FCC's "switch carve out" rule does not apply in Illinois. Each issue is incorrectly decided: (1) the "network elements platform" *cannot* be resold because Section 801(d)(4) allows the CLEC to use it *only* to provide services to its

"end users or pay telephone service providers" – not to sell it other carriers; (2) an Ameritech Illinois local switch used to provide dial tone service to an Ameritech end user *cannot* become part of the "network elements platform" for at least five reasons – chief among them the fact that it is not within the definition of "platform" under Illinois law and that it could never satisfy the "necessary and impair" test; and (3) the "switch carve out" rule applies in Illinois because it is a by-product of the "necessary and impair" test which states are bound to follow under federal law.

10. Requests for Additional Combinations

Ameritech Illinois agrees with much of the Proposed Order's treatment of requests for additional combinations. There are two aspects of the Proposed Order, however, to which Ameritech Illinois takes exception. First, Ameritech Illinois objects to the ability of a CLEC to trigger the BFR-OC process for new UNE combinations merely by pointing to a retail service provided by Ameritech Illinois. Nothing in Section 13-801 authorizes this procedure and it is, in fact, inconsistent with the clear separation between resale and (in Section 13-801(f)) and access to network elements (in Section 13-801(d)). Second, Ameritech Illinois recommends some clarifications to the notification requirements.

11. Schedule of Rates

Ameritech Illinois agrees with most of the conclusions of the Proposed Order on the Schedule of Rates issues. However, Ameritech Illinois takes exception to the holding that an Ameritech Illinois rate quotation will be legally binding even if it does not contain the correct tariff rates. Section 9-240 of the Illinois Public Utilities Act clearly establishes that Ameritech

Illinois cannot charge more or less than the rates set forth in its tariffs. The proposed requirement would repeal Section 9-240 and must be rejected.

12. Miscellaneous Issues

a. Commission Approved Rates

Ameritech Illinois takes exception to the Proposed Order's finding that the term "Commission approved" should be inserted before the word "rates" in the tariff. The effect of that change would be that Ameritech Illinois could only charge rates that had been through the formal process of suspension, investigation and hearing. Section 9-201(b) of the PUA, however, establishes that rates filed with the Commission and not suspended by the Commission "*shall… go into effect and be the established and effective rates*" of Ameritech Illinois. Under Section 9-240, Ameritech Illinois must charge those "established and effective rates". Stated differently, once a public utility files tariffed rates with the Commission and once those rates go into effect, those tariff rates are not only legally authorized – they are legally required. The Proposed Order would invalidate rates that are unquestionably effective under the law and must be rejected.

b. Presubscription and PIC Changes

The Proposed Order adopts two changes to tariff language proposed by Ameritech Illinois to comply with the provision of Section 13-801(d)(6) that provides after three business days a CLEC is entitled to receive all revenues for local exchange and access services that utilize a preexisting UNE-P. The changes adopted by the Proposed Order will inject more, not less, ambiguity in the tariff language and do not reflect the intent of Section 13-801(d)(6).

II. THE PROPOSED ORDER'S CONCLUSION THAT AMERITECH ILLINOIS IS REQUIRED TO PROVIDE CLECS WITH SPLITTERS AS PART OF THE UNE-P IS CONTRARY TO LAW

The Proposed Order concludes that when Ameritech Illinois is engaged in a "line-sharing" arrangement with a data CLEC using an Ameritech Illinois-owned splitter, and the end-user switches voice service to a voice CLEC desiring to use an unbundled network elements platform ("UNE-P"), Ameritech Illinois should be required to "migrate" the end-user's voice service to a UNE-P arrangement, with Ameritech Illinois' splitter becoming part of the platform. For the reasons discussed below, the Proposed Order's decision in this regard should be rejected because it is unsupported by a proper interpretation of Section 13-801, is contrary to law, and would render Section 13-801(d)(4) invalid as a violation of the Supremacy Clause of the United States Constitution.

A. THE PROPOSED ORDER'S DECISION IS DIRECTLY CONTRARY TO ORDERS OF THIS COMMISSION AND THE FCC

The Proposed Order's conclusion is directly contrary to Orders of the FCC and this Commission which make it clear that an ILEC has no legal obligation to provide splitters to CLECs under any circumstances. (Am. Ill. Ex. 4.0, p. 14; Am. Ill. Ex. 4.1, p. 34). In Docket 00-0312/00-0313 (Consol.), for example, the Commission concluded that it has no authority to "require Ameritech Illinois to provide the splitter functionality". Arbitration Decision, p. 13, Docket Nos. 00-0312/00-0313 (August 21, 2000). The Commission reaffirmed this ruling on May 1, 2001, in Docket No. 00-0393, when it stated as follows:

> The Commission finds that Ameritech Illinois is not required to provide line splitting as proposed by AT&T for the following reasons. Under the Line Splitting Order Ameritech Illinois has been required, and has agreed to provide access to the HFPL over the UNE-P when Ameritech Illinois is not the voice provider, when a requesting carrier provides the splitter, which is the extent of its obligation. Ameritech Illinois is not required to provide

> splitters under any circumstances and, therefore, cannot be required to provide them to CLECs utilizing the UNE-P. The line splitting proposal would require us to order the unbundling of "splitters" as a new UNE, something the FCC has declined to do to date and for which we can find insufficient evidence to satisfy even the "impair" tests of FCC Rule 317 and Section 251(d)(2) of the Act.

Amendatory Order, Docket No. 00-0393, p. 1 (May 1, 2001).

The Proposed Order's decision also is contrary to federal law insofar as it would require Ameritech Illinois to make separately available to CLECs both the high frequency portion and the low frequency portion of a loop that is not being used by Ameritech Illinois to provide voice service. The FCC has refused to unbundle the low frequency portion of the loop: "In the Line Sharing Order, the FCC unbundled the high frequency portion of the loop when the incumbent LEC provides voice service, but did not unbundle the low frequency of the loop and did not obligate incumbent LECs to provide xDSL service under the circumstances AT&T describes." Texas 271 Order, ¶ 330.

Consistent with this ruling, the FCC also has made it clear that ILECs are required to offer the high frequency portion of the loop ("HFPL") as a UNE only where the ILEC is providing the end-user's voice service. In other words, ILECs are not required to unbundle the HFPL of loops over which the ILEC does not provide voice service. Line Sharing Order, at ¶ 72[1]. The FCC reiterated this conclusion in its Line Sharing Reconsideration Order (¶ 17)[2]:

> As described above, in the Line Sharing Order, the Commission limited line sharing "to those instances in which the incumbent LEC is providing, and continues to provide, voice service on the particular loop to which the [contemplating] carrier seeks access." In other words, a competing carrier seeking to provide xDSL service using the unbundled high frequency portion of the loop can do so only if the same loop is used by the incumbent LEC to provide voice service to an end user.

[1] Deployment of Wireline Services Offering Advanced Telecommunications Capability, Third Report and Order, CC Docket No. 98-147, (Released December 9, 1999).

[2] Deployment of Wireline Services Offering Advanced Telecommunications Capability, Third Report and Order on Reconsideration, CC Docket No. 98-147, (Released January 19, 2001).

Because Ameritech Illinois has no obligation to provide access to the HFPL when it no longer is the provider of voice service, Ameritech Illinois cannot lawfully be required to provide the splitter when an end user switches its voice service from Ameritech Illinois to a CLEC. Yet that is precisely what the Proposed Order would require.

The Proposed Order concludes that Section 13-801 should be interpreted as a legislative mandate to overturn not only the FCC's decisions discussed above, but also this Commission's ruling, made approximately one month before the enactment of Section 13-801, that "Ameritech Illinois is not required to provide splitters under any circumstances and, therefore, cannot be required to provide them to CLECs utilizing the UNE-P." Amendatory Order, Docket 00-0393, p. 1 (May 1, 2001). If the General Assembly were dissatisfied with this ruling, however, the General Assembly presumably would have amended the statute to expressly reverse the ruling and identify the "circumstances" in which Ameritech Illinois can be required to provide its own splitters to a CLEC. The General Assembly did not do so. In fact, neither Section 13-801, nor any other provision of the Act, as amended by PA 92-29, even mentions the words "splitter" or "line splitting." Accordingly, there is no basis to conclude that the General Assembly intended to overturn the well-established law on splitters as reflected in the Commission's rulings in Dockets 00-0312/00-0313 and 00-0393. May 1991 Will County Grand Jury, 152 Ill.2d 381, 388 (1992) ("A statute should not be construed to effect a change in settled law of the State unless its terms clearly require such a construction").

B. THE PROPOSED ORDER IMPROPERLY INTERPRETS SECTION 13-801(d)(4) IN A MANNER WHICH WOULD RENDER IT INVALID AS A VIOLATION OF THE SUPREMACY CLAUSE

As the Proposed Order (p. 30) recognizes, in concluding that Ameritech Illinois "is not required to provide splitters under any circumstances," the Commission determined that the

splitter does not meet the "impair" test of FCC Rule 317 and Section 251(d)(2) of the 1996 Act, because CLECs can purchase splitters on their own just as easily as Ameritech Illinois from third party vendors. Amendatory Order, Docket No. 00-0393, p. 1. The Proposed Order cites no evidence (and none was presented) to support a change in the Commission's determination in this regard. The only evidence with respect to whether splitters meet the "impair" test was presented by Mr. Welch, who testified that unaffiliated CLECs are right now purchasing and installing their own splitters in their collocation cases and providing splitter functionality themselves in ILEC central offices, proving that they are not impaired in their ability to provide advanced services. (Am. Ill. Ex. 4.1, p. 32)[3].

The Proposed Order, however, concludes that Section 13-801(d)(4) should be construed as requiring Ameritech Illinois to provide the splitter as part of a "network elements platform," without regard to whether the splitter meets the "impair" test. To reach this result, the Proposed Order concludes, based on the absence of the word "unbundled," that Section 13-801(d)(4) "relegates the concept of unbundling to the scrap heap of time" and "forces the provision of a platform consisting of apparently any and all 'combined network elements,'" regardless of whether such network elements meet the "necessary" and "impair" tests required by the 1996 Act and FCC Rule 317. (Prop. Order, pp. 30-31). Based on a determination that a "splitter" is a "network element," the Proposed Order (p. 31) surmises that the "legislature must have intended that splitters be provided to any requesting carrier that seeks to provide service through the

[3] AT&T no longer supports the unbundling of splitters. On February 14, 2002, counsel for AT&T notified the ALJ and all parties of record that AT&T "is no longer pursuing SBC's provision of splitters. For this purpose a splitter is defined as a 'passive device within the Telco central office used to separate the voice and data on a standard XDSL capable loop". Letter of Cheryl Hamill to Administrative Law Judge Donald L. Woods, February 14, 2002.

purchase of a platform."[4]

The Proposed Order's analysis of Section 13-801(d)(4) disregards entirely the first sentence of Section 13-801(a), which states that:

> This Section provides additional State requirements contemplated by, but not inconsistent with Section 261(c) of the Federal Telecommunications Act of 1996, and not preempted by orders of the Federal Communications Commission.

Section 261(c) of the 1996 Act provides that

> . . . nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

(Emphasis added).

Thus, the General Assembly made it clear in Section 13-801(a) that the provisions of Section 13-801(d)(4) should not be construed in a manner which is inconsistent with, or preempted by, the 1996 Act and the FCC's implementing rules and regulations. Yet the Proposed Order goes out of the way to do just that.

There can be no doubt that Section 13-801(d)(4) if interpreted and applied in the manner suggested by the Proposed Order would be inconsistent with, and preempted by, the 1996 Act and the FCC's implementing rules. Under Section 251(d)(2) of the 1996 Act, CLECs are entitled to obtain access to an ILEC's network elements only if such access is "necessary" (in the case of proprietary network elements), or if the lack of access would "impair" the CLEC's ability to provide service (in the case of non-proprietary network elements). Section 251(d)(2)

[4] The Proposed Order's conclusion that a "splitter" falls within the definition of a "network element" is unsupported. The splitter is not equipment used by Ameritech Illinois to provide a telecommunications service to its customers and, therefore, it is not a "network element," as defined in Section 13-216 of the PUA. 220 ILCS 5/13-216. When a splitter is provided by Ameritech Illinois in a line sharing arrangement (i.e., an arrangement in which Ameritech Illinois is the voice service provider), it is done solely for the convenience of the data CLEC to enable it to obtain access to the HFPL and provide service to its customers.

represents a policy judgment by Congress that an ILEC's obligations to share its own facilities with competitors should be limited. AT&T Corp. v. Iowa Utils Bd., 525 U.S. 366, 390 (1999) (holding that Congress did not "want[ ] to give [CLECs] blanket access to incumbents' networks"). As interpreted by the Proposed Order, Section 13-801(d)(4) would, contrary to Congress' intent, impose an unlimited obligation to provide CLECs with "blanket access" to "any and all combined network elements." As the Supreme Court has explained, however, where Congress has made a specific "policy judgment" as to how the "law's congressionally mandated objectives" would be "best promoted," the States are not at liberty to deviate from those "deliberately imposed" federal prerogatives. Geier v. American Honda Motor Co., 529 U.S. 861 (2000), at 872 (conflicts between state and federal law that "prevent or frustrate the accomplishment of a federal objective . . . are nullified" by the Supremacy Clause).

Furthermore, the FCC's regulations expressly require that State commissions comply with the "necessary" and "impair" standards "when considering whether to require the unbundling of additional network elements." 47 CFR 51.317(d)(4). As the United States Supreme Court has explained, federal regulations represent the actions of an administrator empowered by Congress to act on its behalf. Fidelity Federal Savings and Loan Assoc. v. De la Cuesta, 458 U.S. 141, 153-54 (1982). For this reason, FCC Rule 317 has "no less preemptive effect" than a direct mandate by Congress in the 1996 Act. (Id.).[5]

The Proposed Order (p. 32) asserts that the Commission should disregard Ameritech Illinois' arguments about the preemptive effect of Section 251(d)(2) and FCC Rule 317, stating

[5] As the Supreme Court has recognized, the role of state commissions is to uphold and implement the FCC rules, not to nullify them. Indeed, where the FCC has spoken on an unbundling issue by making an "affirmative finding as to whether or not the particular element now satisfies the unbundling standards of the Act" (UNE Remand Order, ¶ 157), its pronouncement "draw[s] the lines to which [state commissions] must hew." IUB II, 525 U.S. at 378 n. 6 (state commissions must regulate "in accordance with federal policy")" UNE Remand Order, ¶ 154 (state-imposed unbundling duties must "meet the requirements of section 251 and the national policy framework instituted in this Order").

that "this is, in reality, an attack on the constitutionality of Section 13-801 and . . . this Commission is not the appropriate body to whom to make these arguments." The Proposed Order misses the point completely. Ameritech Illinois has urged, and continues to urge, that Section 13-801(d)(4), and other provisions of Section 13-801, be interpreted, and applied, to the fullest extent possible, in a manner that is consistent with, and not preempted by, the 1996 Act and the FCC's implementing orders and regulations.

Ameritech Illinois' approach to interpreting and applying Section 13-801 is supported not only by the legislative intent expressed in Section 13-801(a), but also by the rule that a statutory interpretation "which renders a statute unconstitutional or otherwise invalid should be discarded." Northwest Airlines, Inc. v. Department of Revenue, 295 Ill. App. 3d 889, 893 (1st Dist., 1998). See also, Craig v. Peterson, 39 Ill.2d 191, 233 N.E.2d 345, 351 (1968). The Proposed Order violates this fundamental rule of statutory construction. Simply stated, an interpretation of Section 13-801(d)(4) which purports to "relegate" an essential element of the statutory framework adopted by the United States Congress (i.e., the "necessary" and "impair" standards) to the "scrap heap of time" (Prop. Order, p. 30) will necessarily render that Section invalid as a violation of the Supremacy Clause of the United States Constitution.

Furthermore, there is no reason for the Commission to interpret Section 13-801(d)(4) as "forcing" Ameritech Illinois to provide "any and all network elements," thereby rendering it unconstitutional. As will be discussed below, the term "platform" as used in Section 13-801(d)(4) means a combination of an unbundled loop and unbundled switching with shared transport. Thus, Section 13-801(d)(4) need not (and should not) be interpreted as requiring the provision of other types of equipment, such as "splitters," which an ILEC is not required to

provide to a CLEC as an unbundled network element pursuant to the "necessary" and "impair" tests.

By resting its interpretation of Section 13-801(d)(4) on the absence of the word "unbundled," the Proposed Order misperceives the purpose of that Section. Section 13-801(d)(4) is not intended to "force the provision" of any combinations of network elements, including those elements which comprise a "platform." Rather, Section 13-801(d)(4) speaks to the manner in which a "network elements platform" may be "used." Specifically, the Section provides that a CLEC may "use" a "platform" to provide "end-to-end telecommunications service for the provision of existing and new local exchange, interexchange that includes local, local toll, and intraLATA toll, and exchange access telecommunications services within the LATA to its end users or payphone providers without the requesting telecommunications carrier's provision or use of any other facilities or functionalities."

The provisions of Section 13-801 which require Ameritech Illinois to provide CLECs with combinations of network elements, including combinations of network elements that comprise the "platform," are Sections 13-801(d)(2) and (3). Those Sections require that: (i) an ILEC "shall not separate network elements that are currently combined, except at the explicit direction of the requesting carrier" (Section 13-801(d)(2); and (ii) "[u]pon request, an [ILEC] shall combine any sequence of unbundled network elements that it ordinarily combines for itself . . ." (Section 13-801(d)). The Proposed Order correctly does not interpret Sections 13-801(d)(2) and (3) as requiring Ameritech Illinois to provide combinations of network elements which do not meet the "necessary" and "impair" tests. To the contrary, the Proposed Order expressly concludes that, under Section 13-801(d)(3), the network elements which Ameritech Illinois is required to combine on behalf of CLECs do not include any network element "that the

Commission does not require the Company to provide as an Unbundled Network Element" on the basis of a "'necessary' and 'impair' inquiry." (Prop. Order, pp. 57, 72).

The Proposed Order's interpretation of Section 13-801(d)(4) is, therefore, fundamentally inconsistent with the statutory framework enacted by the General Assembly because it suggests that a CLEC would be able to obtain something under Section 13-801(d)(4) (i.e., a "platform" consisting of "any and all combined network elements") to which the CLEC is clearly not entitled under Sections 13-801(d)(2) and (3).[6] There is no reason to conclude that the General Assembly intended such a result.

C. THE PROPOSED ORDER'S DEFINITION OF THE TERM "PLATFORM" IS UNSUPPORTED

The Proposed Order's conclusion that Ameritech Illinois is required to provide CLECs with "any and all network element combinations" is contrary to the well-established definition of the term "platform." The FCC has consistently defined a "platform" to include only unbundled local loops, switches, and transport. For example, in the UNE Remand Order (¶ 12), the FCC stated that "only recently have incumbent LECs provided access to combinations of unbundled loops, switches, and transport elements, often referred to as the platform" (emphasis added). In the FCC's Line Sharing Order, the FCC reaffirmed that "the platform refers to combinations of loop, switching, and transport unbundled network elements used to provide circuit-switch voice

[6] Although the Proposed Order does not expressly address Section 13-801(d)(2), that Section also cannot be construed as requiring Ameritech Illinois to provide existing combinations which include network elements or other equipment which does not meet the "necessary" and "impair" tests, as only those network elements which meet those tests have to be provided to CLECs. 47 U.S.C. § 251(d)(2); *IUB II*, 525 U.S. at 388-92. Section 13-801(d)(2) implements as Illinois law the substance of FCC Rule 315(b), which provides that "[e]xcept upon request, an incumbent LEC shall not separate requested network elements that the inclement LEC currently combines". 47 CFR § 51.315(b). Despite the absence of the word "unbundled" from FCC Rule 315(b), that Rule has never been interpreted as establishing a CLEC's right to obtain access to existing combinations of network elements which do not meet the "necessary" and "impair" test.

service" (emphasis added).[7] Similarly, the Illinois Commerce Commission in Docket No. 95-0458 adopted Staff's proposal that Ameritech Illinois make available a "platform" consisting of three components including the loop, the local switch platform (i.e. local switching) and interoffice transport. (Docket No. 95-0458, issued June 26, 1996, pp. 58 and 63). The three components of the "platform" identified by the Commission – loop, local switching, and interoffice transport—are the same as those included in the FCC definition of "platform."

The Proposed Order (p. 31) concludes that the legislature must have intended to reject the definition of a "platform" previously adopted by this Commission and the FCC. In support of this conclusion, the Proposed Order surmises that "if the legislature had intended us to retain the status quo, it would have defined the platform as we have previously defined the UNE-P" and that the "fact that it did not indicates to us its displeasure with the definition we previously adopted . . ." (Prop. Order, p. 31). Once again, the Proposed Order disregards fundamental rules of statutory construction. The General Assembly is presumed to know existing law, including the body of law existing in administrative regulations. Citizens Utility Company of Illinois v. Illinois Pollution Control Board, 133 Ill. App. 3d 406, 409, 478 NE2d 853, 855 (1985). Thus, when a statute employs words, such as "platform," "which have well known legal significance, absent any contrary expression, courts assume that the legislature intended the words to have that meaning." People v. Warren, 173 Ill.2d 348, 370 (1996) (citing People ex rel. Mayfield v. City of Springfield, 16 Ill.2d 609, 615 (1959). Accordingly, because there is no definition of the "platform" in Section 13-801(d)(4), the legislature should be presumed to have adopted the definition of the term "platform" established by this Commission and the FCC.

[7] Deployment of Wireline Services Offering Advanced Telecommunication Capability, CC Docket No. 98-147, Third Report and Order, (Released December 9, 1999), n. 161.

The Company's interpretation of Section 13-801(d)(4) and the meaning of the term "platform" as used in that Section is also supported by the testimony of Mr. David Gebhardt, the only witness with extensive involvement in the legislative process which led to the enactment of Section 13-801(d)(4). Mr. Gebhardt testified as follows:

> There is nothing in Section 13-801 (d)(4) which can be construed to expand the definition of a UNE Platform. As Mr. Welch explained in his direct testimony, the UNE Platform consists of a local loop, unbundled local switching and shared transport. It does not include use of the switch on the terminating end of the call and nothing in Section 13-801 changes that. Neither the phrase "without the requesting telecommunications carrier's provision or use of any other facilities or functionalities" nor the phrase "end to end telecommunications service" expand the definition of a UNE Platform. To the contrary, they are intended to describe how the UNE-Platform can be used by a CLEC.

(Am. Ill. Ex. 9.0, pp. 3-4).

The Company's understanding of the meaning of the term "platform" as used in Section 13-801(d)(4) is also supported by the testimony of Staff witness Graves, who explained that "shared transport is an integral part" of the platform. (Staff Ex. 1.0, p. 20). Mr. Graves' testimony undermines the Proposed Order's conclusion that a "platform" can consist of "any and all combined network elements," such as a loop-dedicated transport combination used to provide "point-to-point data service" which does not included shared transport.

The conclusion that the legislature intended to adopt the established definition of a "platform" as consisting of an unbundled loop, switch and shared transport is also supported by Section 13-801(d)(6). That Section provides, in pertinent part, that absent a contrary agreement entered into after the effective date of PA 92-22, "as of 12:01 a.m. on the third business day after placing the order for a network elements platform, the requesting telecommunications carrier shall be the presubscribed primary local exchange carrier for that end user line . . ." (emphasis added). A carrier cannot be an end user's "primary local exchange carrier," unless the carrier provides the end user with access to the public switched network. And the only way that a

carrier can provide such access using a "platform consisting solely of combined network elements" for the provision of local exchange service on an "end-to-end" basis, is if the "platform" consists of a combination of an unbundled loop, and unbundled local switching with shared transport. Furthermore, the term "presubscribed" is one that is commonly used to denote a customer's designated carrier for the provision of switched services. (See, e.g., 83 Ill. Admin. Code Section 773.10, defining "presubscription" as a "procedure by which a customer can pre-designate one or more IXCs to access for its presubscribed switched intraMSA and interMSA calls, without directing an access code") (emphasis added).

Thus, the requirement of Section 13-801(d)(6) that a CLEC shall become the "presubscribed primary local exchange carrier" for the "end user line" within three days after ordering "network elements platform" makes it abundantly clear that the General Assembly understood the term "network elements platform," as used throughout Section 13-801 (including Section 13-801(d)(4)), to mean a combination of unbundled loop and unbundled local switching with shared transport. Robbins v. Board of Trustees, 177 Ill.2d 533, 541 (1997) (stating that a word or phrase used in different sections of the same statute is presumed to have the same meaning in each section).

Based on its erroneous conclusion that the legislature intended to reject the Commission's definition of a "platform," the Proposed Order (p. 72) further determines that a "network elements platform" may consist of an "unbundled loop and dedicated transport to provide point-to-point data circuits." To the extent that a "point-to-point data circuit" originates and terminates in two different exchanges, however, such a circuit is clearly not used to provide "local exchange telecommunications service," which is defined in the Act to mean "telecommunications service between points within an exchange as defined in Section 13-206, or the provision of

telecommunications service for the origination or termination of switched telecommunications service." 220 ILCS 5/13-206 (emphasis added). Moreover, even if a "point-to-point data circuit" were used to transmit telecommunications service within an exchange, the provider of such service could not logically be deemed to be the end-user's "primary local exchange carrier," unless the provider also happened to be the end-user's switched local exchange service provider.

In short, it would make no sense to conclude that every carrier which requests a combination of unbundled loop and dedicated transport to provide private line, or "point-to-point data", service should be deemed to be the end-user's "presubscribed primary local exchange carrier." Yet that would be the necessary effect of Section 13-801(d)(6) if the Proposed Order's overly broad definition of the term "network elements platform" were adopted.

Furthermore, if a CLEC which provides only "point-to-point data," or private line, service to an end-user, were deemed to be the end-user's "presubscribed primary local exchange carrier" (as the CLEC must be deemed, if the Proposed Order's definition of "network elements platform" is adopted), that CLEC would be required to bear all of the responsibilities attendant to being a "primary local exchange carrier". There is no basis to believe that the General Assembly intended to impose such obligations on carriers which do not hold themselves out as offering switched voice local exchange service, as opposed to private line service.

An interpretation of the term "platform" to include "any and all combined network elements" is also inconsistent with the provision of Section 13-801(d)(6) which generally requires that, where no field work is needed outside of the central office, the ILEC "shall provide the requested network elements platform within 3 business days for at least 95% of the requesting telecommunications carrier for each month." The enactment of a standard 3 day interval for the provisioning of existing network elements platforms strongly suggests that the

General Assembly understood the term "platform" to include a standard set of unbundled network elements, i.e., loop, switch and shared transport. There is no evidence to suggest that a provisioning interval which is appropriate for one combination of network elements is appropriate for "any and all combined network elements."[8]

The Proposed Order's definition of the "platform" as consisting of "any and all, combined network elements," is also inconsistent with Section 13-801(j), which provides that "other than as provided in subdivision (d)(4) of this Section for the network elements platform described in that subdivision . . . nothing [in Section 13-801] is intended to require or prohibit the substitution of special access services by or with a combination of network elements nor address the Illinois Commerce Commission's jurisdiction or authority in this area." 220 ILCS 5/13-801(j). If the term "platform" is defined to consist of "any and all combined network elements," it would, by definition, also include all combinations of network elements used to provide switched and special access services. But if the term "platform" is defined to include all combinations of network elements used to provide switched or special access services, then such combinations would all fall within the exception to Section 13-801(j) created by the phrase "other than as provided in subdivision (d)(4) of this section for the network elements platform described in that subdivision." As a result, the exception would swallow the rule, thereby rendering Section 13-801(j) meaningless. The General Assembly should not be presumed to

[8] For example, the process needed to convert a private line or "point-to-point" data circuit to an existing combination of UNEs is much different than the process used to migrate a customer to a CLEC over an existing UNE-P. The conversion process for a private line requires a "disconnection" from the existing billing and maintenance systems and "installation" to the UNE billing and maintenance systems without disruption to the service. This requires coordination and order activity that may be transparent to the CLEC and the end-user but is nevertheless necessary to complete the conversion process to ensure the high level of service that Ameritech Illinois aspires to offer to all customers. Additionally, existing private line services may have customer premise equipment integral to that service that may require coordination with end-user vendors for proper provisioning in the UNE environment. The time interval necessary to complete the conversion of the private line will, therefore, vary depending on the specific circumstances and should not be subject to an inflexible mandatory 3 day standard.

have enacted a section which is meaningless and has no effect. Allord v. Municipal Officers Electoral Board, 288 Ill. App. 3d 897, 903 (1st Dist. 1997) (statute should not be construed in a manner which "reduces language to meaningless surplusage").

In sum, the term "platform" as used in Section 13-801(d)(4) must be defined as a subset of "any and all combined network elements." In the absence of any statutory definition expressly identifying the set of network elements which comprise a platform, it should be assumed that the General Assembly intended to define the term "platform" in accordance with the well-established regulatory definition of that term as consisting of unbundled loop, and unbundled switching with shared transport. As the above discussion demonstrates, this is the only assumption that makes sense based on an analysis of the entire statute.

D. SECTION 13-801(d)(4) CANNOT HAVE ANY IMPACT ON SPLITTERS USED IN THE PROVISION OF INTERSTATE SERVICE

Even if Section 13-801 could be construed as requiring Ameritech Illinois to provide CLECs with the use of Ameritech Illinois' own splitters (and it cannot be), that Section would only impact use of splitters in the provision of intrastate service. Splitters, however, are used to separate voice and data signals to accommodate the provision of DSL service over the high frequency portion of the loop. The predominant use of DSL is to provide access to the internet, and the FCC has ruled that the use of DSL to access the internet is always an interstate service. In the Matter of GTE Telephone Operating Cos., Memorandum of Opinion and Order, CC Docket No. 98-79, FCC 98-292 (Released Oct. 20, 1998) ("ADSL Order"). Accordingly, the splitter is almost always used to provide an interstate service and, therefore, falls squarely within the scope of the FCC's orders previously discussed, which make it clear that ILECs have no obligation, and cannot be required, to provide CLECs with splitters.

E. THE PROPOSED ORDER'S DECISION ON THE SPLITTER IS NOT NECESSARY TO PROMOTE COMPETITION

In support of its line splitting proposal, the Joint CLECs argued that CLECs will be competitively harmed unless Ameritech Illinois is required to provide splitters as part of a "network elements platform." This suggestion is directly contrary to the Commission's previous determination that splitters do not meet the "impair" test and is unsupported by any evidence. To the contrary, the evidence shows that CLECs have the ability to engage in line splitting without the use of the Ameritech Illinois-owned splitter. Mr. Welch presented unrefuted evidence demonstrating (i) that CLECs wishing to provide both voice and data can do so utilizing Line Splitting; (ii) how one CLEC wishing to provide voice service and a separate CLEC wishing to provide data service can engage in Line Splitting, even if they have separate collocation cages; and (iii) how two separate CLECs can share collocation to engage in Line Splitting. (Am. Ill. Ex. 4.0, p. 12, Attach. 1; Am. Ill. Ex. 4.1, p. 38). As Mr. Welch explained, CLECs desiring to provide DSL services using central office-based DSL-capable copper loops must already have equipment such as DSLAMs collocated in the central office. The DSL technology requires the DSLAM to be located in the central office where the copper loop facility terminates. Line Sharing Order, ¶ 67. Since the data CLEC will already have obtained collocation, that collocation area can be utilized for the CLEC-supplied line splitters. Any two CLECs cooperating to engage in line splitting would merely incorporate the splitter ownership issue into their business arrangement. (Am. Ill. Ex. 4.1, pp. 38-39).

Thus, as the Commission concluded in Docket 00-0393:

> There is also no support for AT&T' s assertion that it will be competitively harmed unless Ameritech Illinois is required to provide the splitter. Ameritech Illinois is in no better position than AT&T to purchase and install splitters. If AT&T would take this step, it could provide both voice and data service over the UNE-P loop that it has leased from Ameritech Illinois. Significantly, the record establishes that AT&T can serve customers

> and compete in a variety of other ways, including through FCC-mandated line sharing, or through partnering with a data CLEC that has its own splitters and DSLAMs, or through the provision of cable modem and/or cable telephony services. In short, it is just as easy for AT&T to purchase and install, or team with a data CLEC that purchases and installs, its own splitters and combine those splitters with the UNEs that make up the UNE-P, as it is for Ameritech Illinois to perform those tasks. If the FCC thought that AT&T' s proposed "line splitting" requirement was necessary to the development of competition, it would have ordered ILECs to provide it. The FCC did not do so and we decline to do so at this time.

(Order, Docket 00-0393, p. 55).

On the other hand, the Proposed Order's decision, if affirmed, will harm Ameritech Illinois. The Company would encounter numerous technical and operational difficulties if it were required to provide a splitter for CLEC line splitting when Ameritech Illinois is not the underlying voice provider to the end user. (Am. Ill. Ex. 4.2, p. 6). As Mr. Welch explained, a major concern is the question of which CLEC (if not both) would be the customer of record and the implication of "control" over the loop. (Id.). The Proposed Order's decision, if adopted, would put Ameritech Illinois in the untenable role of coordinating, with two other carriers, maintenance/repair, ownership, billing, change of service or service provider and other issues even through Ameritech Illinois has no relationship with the end user. (Id.). Additional operational issues would arise due to differences in the ordering and provisioning systems related to (i) migrating an existing retail voice service (with an associated telephone number) to a Line Sharing scenario; and (ii) attempting to migrate UNEs (which may not have any associated telephone number), specifically a DSL-capable loop, to a Line Splitting scenario. (Id., pp. 6-7). It is for reasons such as these that the FCC, in its Line Sharing Order, found that an ILEC should only be obligated to coordinate with a single carrier:

> It is clear from the record that the complexities involved with implementing line sharing dramatically increase where more than two service providers share a single loop. We

> believe that serving multiple customers would be very costly, time consuming, and would lead to complex operational difficulties.[9]

For all the reasons discussed, the Commission should reverse the Proposed Order and reject the Joint CLECs' line splitting proposal.

III. THE COMPANY'S COLLOCATION TARIFF COMPLIES WITH THE COLLOCATION REQUIREMENTS OF SECTION 13-801(c)

Ameritech Illinois' currently effective Collocation Tariff, which was approved by the Commission in Docket 99-0615, provides, in part, as follows:

> Requesting carrier may collocate equipment necessary for interconnection with the Company as required by 47 U.S.C. § 251(c)(2) or access to the Company's unbundled network elements as required by 47 U.S.C. § 271(c)(3). Requesting carrier shall not collocate equipment that is not necessary for either such interconnection or such access.

(Ill. CC No. 20, Part 23, 4th Rev. Sheet, ¶ 10a.1). As discussed in the Company's Initial Brief (pp. 107-08), Ameritech Illinois has proposed to amend this Commission-approved language to comply with Section 13-801(c) by explicitly identifying specific types of equipment that may be collocated and to clearly provide for "physical and virtual collocation of any type of equipment necessary" for interconnection or access to unbundled network elements.

A. THE PROPOSED ORDER'S ELIMINATION OF THE NECESSARY STANDARD IS UNSUPPORTED BY SECTION 13-801(c) AND CONTRARY TO LAW

The Proposed Order adopts Staff's recommendation that the word "necessary," as used both in the currently effective tariff language approved by the Commission in Docket 99-0615, and in the modified version of that language proposed by Ameritech Illinois in this proceeding, should be removed. As the basis for its decision, the Proposed Order assumes that because the word "necessary" does not appear in Section 13-801(c), the General Assembly must have

[9] Line Sharing Order, ¶ 74.

intended to impose upon Ameritech Illinois collocation obligations greater than those imposed by the 1996 Act, which limits the scope of the collocation requirement to "equipment necessary for interconnection or access to unbundled network elements." 47 U.S.C. § 251(c)(6).

Ameritech Illinois takes exception to the Proposed Order's decision. As in the case of its analysis of Section 13-801(d)(4), discussed in Section II, supra, the Proposed Order goes out of its way to interpret and apply Section 13-801(c) in a manner that is inconsistent with, and preempted by, the provisions of the 1996 Act and the orders and rules of the FCC implementing the 1996 Act. In doing so, the Proposed Order completely disregards (i) the legislature's statement that the provisions of Section 13-801 (including Section 13-801(c)) should be interpreted in a manner which is not inconsistent with the 1996 Act and the FCC's rules and orders (220 ILCS 5/13-801(a)), and (ii) the rule of statutory construction which requires that "an interpretation which renders a statute unconstitutional or otherwise invalid should be discarded." Northwest Airlines, Inc. v. Department of Revenue, 295 Ill. App. 3d 889, 893 (1st Dist., 1998) (citing People v. Williams, 119 Ill. 2d 24, 28 (1987); and In re Annexation of Territory to City of Park Ridge, 260 Ill. App. 3d 384, 389 (1984)).

Here, as in its discussion of line-splitting, the Proposed Order suggests that the Commission need not concern itself with the question of whether a particular interpretation of Section 13-801(c) is consistent with federal law, stating that "Ameritech has pointed us to nothing in the Telecommunications Act of 1996 that directs itself to state legislation." This statement is wrong. In both its Initial Brief (pp. 89, 109) and Reply Brief (pp. 51-52), the Company pointed to Section 261(c) of the 1996 Act, which expressly precludes a "State" from imposing "requirements" that are "inconsistent with this part or the Commission's regulations to implement this part." 47 U.S.C. 261(c). As used in the 1996 Act, the term "State" is not limited

to "State Commissions." Indeed, the terms "State" and "State Commissions" are defined separately in the 1996 Act. 47 U.S.C. 153 (40), (41). Thus, the State "requirements" to which Section 261(c) refers include requirements imposed through legislation.

As interpreted by the Proposed Order, Section 13-801(c) is plainly inconsistent with Section 251(c)(6) of the 1996 Act, which expressly limits the scope of the collocation requirement to "equipment necessary for interconnection or access to, unbundled network elements." 47 U.S.C. § 251(c)(6). The word "necessary" is a critical part of this provision, as it confines the CLEC's right to intrude on ILEC-owned property by establishing a limiting standard on what type of equipment may be collocated. See GTE Service Corp. v. FCC, 205 F.3d 416, 423 (D.C. Cir. 2000). As the FCC recently concluded, Congress used the term "necessary" to balance the need to "promote competition and innovation through the grant of collocation rights" with the need to "protect an incumbent LEC's property interests against unwarranted intrusion" and prevent an "unnecessary taking of private property"; in other words, the term "necessary" is included in the statute because it "balances public and private interests." (Deployment of Wireline Services Offering Advanced Telecommunications Capability, Fourth Order and Report, CC Docket No. 98-147, at ¶¶ 20-21 (Released Aug. 8, 2001) ("Collocation Remand Order") (emphasis in original); GTE Service, 205 F.3d at 423).

Even without Section 261(c), Section 13-801(c), if interpreted in the manner suggested by the Proposed Order, would be preempted by the 1996 Act. As previously discussed, where Congress has made a specific "policy judgment" as to how the "law's congressionally mandated objectives" would "best be promoted," the states are not at liberty to deviate from those "deliberately imposed" federal prerogatives. Geier, 529 U.S. at 872-73, 881 (conflicts between state and federal law that "prevent or frustrate the accomplishment of a federal objective . . . are

'nullified' by the Supremacy Clause"). Moreover, the Supreme Court expressly held that "with regard to the matters addressed by the 1996 Act," the federal government has "unquestionably" "taken the regulation of local competition from the States." AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 378 n. 6 (1999).

The Supreme Court has further held that where, as in the case of collocation, Congress has carefully balanced competing interests as part of a comprehensive statutory scheme, state laws or regulations that upset that balance are preempted. Edgar v. MITE Corp., 457 U.S. 624, 634 (1982) (provisions of Illinois Business Takeover Act preempted because they "upset the careful balance struck by Congress"); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 212, n. 6 (1985) (preempting state laws that "upset the balance of power between labor and management expressed in our national labor policy") (internal quotation marks omitted).

Imposition of a state requirement for collocation of equipment which is not necessary for interconnection or access to UNEs would upset the balance of public and private interests which Congress intended to strike by including the word "necessary" in Section 251(c)(6). Because the equipment (such as a traditional circuit switch) which a CLEC may seek to collocate under the standard suggested by the Proposed Order could be used for the provision of both interstate and intrastate traffic, there is no way that a state requirement to collocate a switch can be consistent with a federal rule that does not require the ILEC to collocate that switch. Simply stated, if the state law is interpreted to require an ILEC to collocate equipment that is not necessary for interconnection or access to UNEs, the federal law limiting the ILEC's collocation obligations would be rendered a nullity. Such a result would eviscerate Ameritech Illinois' property rights and upset the balance of public and private interests which underlies Congress' use of the word

"necessary." See GTE Service, 205 F.3d at 422-23. The Supremacy Clause of the United States Constitution does not countenance such a result.

The Proposed Order completely disregards the relationship between federal and state law, asserting that the Commission "has no authority to declare an Act of the Illinois General Assembly preempted or otherwise unconstitutional." (Prop. Order, p. 18). Once again, the Proposed Order mischaracterizes the Company's position. In this proceeding, Ameritech Illinois has not requested the Commission to "declare" Section 13-801(c) unconstitutional. To the contrary, the Company is requesting that the Commission interpret and apply Section 13-801(c) in a manner which will render it constitutional and valid.

Contrary to the Proposed Order's conclusion, Section 13-801(c) can and should, be interpreted to allow the Commission to approve tariff language incorporating the "necessary" standard. In this regard, the Proposed Order's statement (p. 18) that "any equipment means just that" begs the real question, which is how to interpret and apply the phrase "any equipment for interconnection or access." 220 ILCS 5/13-801(c). That phrase cannot be interpreted and applied without explicitly or implicitly introducing a modifier between the words "equipment" and "for" such as (1) "any equipment necessary for interconnection or access to network elements;" (2) "any equipment the primary purpose of which is for interconnection or access to network elements"; or (3) "any equipment which can be used for interconnection or access to network elements." The Proposed Order assumes that the General Assembly intended to impose a collocation requirement more stringent than that inherent in the "necessary" standard. The Proposed Order is, therefore, implicitly reading into Section 13-801(c) a different modifier (such as " which can be used" or "the primary purpose of which is") between the words "any equipment" and "for." The General Assembly did not, however, adopt any such modifiers.

Pursuant to Section 13-801(a), therefore, it is the Commission's responsibility in the first instance to ensure that Section 13-801(c) is interpreted and applied in a manner which is not inconsistent with the collocation requirements of the 1996 Act. As discussed above, a proper exercise of the Commission's responsibility in this regard dictates an adoption of the "necessary" standard.

Furthermore, the Proposed Order's interpretation and application of Section 13-801(c) is inconsistent with the legislative intent to promote competition. As the Company explained in its Reply Brief (p. 53), removal of the "necessary" standard would inhibit the development of competition because it would allow CLECs to provide for arbitrary and indiscriminate placement within Ameritech Illinois' central offices of equipment which is not necessary for interconnection or access to UNEs, thereby reducing the amount of available space in Ameritech Illinois' central offices to place equipment for which collocation is necessary. For example, the FCC has specifically found that traditional circuit switches generally do not meet the "necessary" standard. Collocation Remand Order, ¶ 48[10]. If removal of the "necessary" standard from the Company's collocation tariff were construed to allow for the collocation of traditional circuit switching equipment, such as a traditional 5ESS circuit switch, it could quickly result in the exhaustion of collocation space within Ameritech Illinois' central offices.

B. STAFF'S PROPOSED LANGUAGE ON MULTIFUNCTIONAL EQUIPMENT SHOULD BE REJECTED OR MODIFIED

Based on the statement that "Staff's proposed language on collocatible equipment is accepted" (Prop. Order, p. 19), Ameritech Illinois assumes that the Proposed Order also intends

[10] Deployment of Wireline Services Offering Advanced Telecommunications Capability, Fourth Report and Order, CC Docket No. 98-147, (Released August 8, 2001).

to adopt the tariff language proposed by Staff for the first time in its Initial Brief clarifying that collocation is required for "multifunctional equipment only if the primary purpose and function of the equipment, as the requesting carrier seeks to deploy it, are to provide the requesting carrier with 'equal in quality' interconnection or 'nondiscriminatory access' to one or more unbundled network elements." (Staff Init. Br., Attach., Ill. CC No. 20, Part 23, Section 4, Rev. Sheet No. 1.2). As the Company noted in its Initial Brief, Section 13-801(c) does not refer to "multifunctional equipment." Moreover, because Ameritech Illinois' collocation tariff incorporates the FCC's "necessary" standard it can, and should, be interpreted as allowing for collocation of "multifunctional" equipment in accordance with the FCC's policy, as set forth in the Collocation Remand Order (¶¶ 32-43, 53). Accordingly, there is no need to adopt Staff's proposed language.

In its Reply Brief (p. 58), the Company proposed that, in the event that the Commission deems it appropriate to include language in the tariff expressly dealing with "multifunctional" equipment, Staff's proposed language should be modified to more closely track the conditions for the collocation of multifunctional equipment adopted by the FCC in its Collocation Remand Order (¶¶ 36, 53), as follows:

> . . . and multifunctional equipment only if the primary purpose and function of the equipment, as the requesting carrier seeks to deploy it, are to provide the requesting carrier with 'equal in quality' interconnection or 'nondiscriminatory access' to one or more unbundled network elements while ensuring that multifunctional equipment places no greater relative burden on the incumbent's property than comparable single-function equipment.

The Proposed Order should be revised to either explicitly reject Staff's language on multifunctional equipment or adopt the language as modified in the manner proposed above.

IV. THE COMPANY'S TARIFF COMPLIES WITH THE STATUTORY REQUIREMENTS FOR CROSS CONNECTS

Ameritech Illinois allows for direct cross-connections between the facilities of carriers under the "Carrier Cross-Connect Service for Interconnection" ("CCCSI"), the terms and conditions of which are contained in Paragraph 5 of Sheet No. 11 of the Company's Collocation Tariff (Ill. C.C. 20, Part 23, Section 4). The Collocation Tariff, including Paragraph 5, was approved by the Commission in its Order dated August 15, 2000 in Docket 99-0615, and is currently in effect. (Am. Ill. Ex. 5.0, p. 5; Am. Ill. Ex. 5.1, p. 9; Am. Ill. Ex. 1.0, Attach. 1.2, p. 85). In accordance with Section 13-801(c), the Company added language to Paragraph 5 to make it clear that direct cross-connections between collocated carriers will be provided "using the most reasonably direct and efficient connections that are consistent with safety and network reliability standards."

The Proposed Order (p. 29) states that it "accepts Staff's proposal that would remove Ameritech's additional limitations on collocation carriers." The Proposed Order is apparently referring to language in Paragraph 5 which provides that, if a Requesting Carrier provides CCCSI, such CCCSI must "comply in all respects with the Company's technical and engineering requirements." The Proposed Order (p. 29) states that it rejects "Ameritech's proposed language, which we find goes far beyond the requirements that collocation be permitted with only an eye to basic safety and network reliability benchmarks." Ameritech Illinois takes exception to the decision.

The Proposed Order, like Staff, fails to make a distinction between (i) the "safety and network reliability" standard applicable under Section 13-801(c) to the cross connect service being offered, and (ii) prudent safety and security procedures that must be followed by Ameritech Illinois and its vendors, as well as the CLECs and their vendors, when working in

Ameritech Illinois offices. Ameritech Illinois' proposed tariff complies with Section 13-801(c), as it provides that cross connects should be provided "using the most reasonably direct and efficient connections that are consistent with safety and network reliability standards." As discussed by Ameritech Illinois witness Bates, however, the "safety and network reliability" standard in Section 13-801(c) does not eliminate the need for other reasonable collocation rules and requirements, such as the work place safety practices. (Am. Ill. Ex. 5.1, pp. 11-12).[11]

Section 13-801(c) does not purport to set forth in detail all of the terms and conditions which must be included in a tariff governing cross-connects between collocated carriers. Accordingly, there is nothing in Section 13-801(c) which supports the Proposed Order's conclusion that the tariff language regarding "technical and engineering requirements" approved just 18 months ago in Docket 99-0615 must now be rejected. To the contrary, as the Company pointed out in its Initial Brief (p. 115), the requirement that requesting carriers, or their third party vendors, comply with the Company's technical and engineering requirements when performing work to install a direct cross-connects is absolutely necessary to ensure that such cross connects are, in fact, "consistent with safety and reliability standards." Accordingly, the Company's tariff complies fully with Section 13-801(c).

The Proposed Order (pp. 29-30) also states that it "accept[s] the Joint CLEC proposal relating to the requirement that Ameritech provide cross-connects between the facilities of collocated and non-collocated carriers and reject[s] Ameritech proposed language that would provide cross connects only between the facilities of collocated carriers as without the

[11] Ameritech Illinois provides voluminous documentation as to such technical and engineering standards on the publicly available CLEC website, in the Collocation Services Handbook, Collocation website technical and engineering standards TP 76300MP and TP76200MP. These standards, which are equally applicable to Ameritech Illinois, CLECs and their respective vendors, prevent (i) placing too much cable or weight in the overhead racking; (ii) placing "live" wires overhead in racking; and (iii) improperly securing of cables (tying-down cable) to prevent wire chafing which can led to central office fires.

requirements of Section 13-801(c)." The Proposed Order's statement reflects a misunderstanding of Ameritech Illinois' position. Contrary to the Proposed Order's suggestion, Ameritech Illinois did not propose tariff language that would only provide for direct cross connects between collocated carriers. While it is correct that Paragraph 5 on Sheet No. 11 of the Company's Collocation Tariff (Ill. CC No. 20, Part 23, Section 4) deals exclusively with direct connections between collocated carriers, other provisions of the Company's proposed tariffs address the statutory requirements related to cross-connections between the UNE platform or transport facilities of a non-collocated carrier and the facilities of a collocated carrier.

First, Ameritech Illinois' currently effective collocation tariff permits CLECs to connect to Ameritech Illinois-provided services including switched access services and/or special access services under the provisions of Ill. CC No. 21, Section 6 and 7, via Ameritech Cross-Connection Service ("ACCS"). (Ill. CC No. 20, Part 23, Section 9, Sheet No. 9.2; Am. Ill. Ex. 1.0, Attach. 1.2, p. 83). As Ms. Bates testified, this tariff language provides for the connection between a non-collocated carrier's transport and the facilities of any collocated carrier. (Am. Ill. Ex. 5.1, p. 11).

Second, Ameritech Illinois' proposed tariffs include a provision responsive to the language of Section 13-801(c) which requires that cross-connections be allowed, and provided for, between a "noncollocated telecommunications carrier's network elements platform . . . and the facilities of any collocated carrier." As Mr. Welch explained, the apparent intent of this statutory provision is to require Ameritech Illinois to accept a non-collocated CLEC's request to disaggregate its UNE-P arrangement (which consists of a combination of a loop and unbundled local switching with shared transport) and cross-connect the switch port to a collocated carrier's space for Line Splitting. (Am. Ill. Ex. 4.1, p. 31). The reason that a CLEC would request such

an arrangement is to partner with a collocated CLEC which has a DSLAM in order to engage in line splitting. (Id.). In accordance with Section 13-801(c), Ameritech Illinois' proposed UNE-P tariff contains language which makes it clear that a non-collocated carrier with UNE-P may request Ameritech Illinois to disaggregate that platform arrangement and, provided that the loop is DSL capable, have the UNE xDSL capable loop and ULS-ST terminated to another carrier's collocation arrangement. (Am. Ill. Ex. 4.0, pp. 12-13; Am. Ill. Ex. 1.0, Attach. 1.2, pp. 18-19 (Section 15, 4th Rev. Sheet No. 1)).

The Proposed Order (p. 32) appears to accept an argument made by the Joint CLECs in their Reply Brief that "Section 13-801(c) requires Ameritech to provide the necessary cross connects to allow UNE-P providers to engage in line splitting without disassembling the UNE-Platform and this Commission must require Ameritech to comply with those requirements." (Prop. Order, p. 29). This argument is unsupported. As Mr. Welch testified, it is not technically possible to cross connect a platform with a data CLEC's facilities in the manner suggested by the Joint CLECs. In order for a voice CLEC and a data CLEC to provide both voice and data service over a single loop, the network elements that make up the platform (the unbundled loop and unbundled switch part) must first be separated (i.e., disconnected) and recombined with the splitter and any advanced services equipment needed to provide the shared use of the loop by both data and voice service. This is a fact of life, as recognized by the FCC in its Line Sharing Reconsideration Order:

> [I]f a competing carrier is providing voice service using the UNE-platform, it can order an unbundled xDSL-capable loop terminated to a collocated splitter and DSLAM equipment and unbundled switching combined with shared transport, to replace its existing UNE-platform arrangement with a configuration that allows provisioning of both data and voice services. As we described in the Texas 271 Order, in this situation, the incumbent must provide the loop that was part of the existing UNE-platform as the unbundled xDSL-capable loop, unless the loop that was used for the UNE-platform is not capable of providing xDSL service.

Line Sharing Reconsideration Order, ¶ 19 (emphasis added). As the FCC makes clear, a UNE-P CLEC that wishes to engage in line splitting is required to replace the UNE-P with "a configuration that allows provisioning of both data and voice services" – namely, an unbundled xDSL-capable loop terminated to the CLECs' collocated splitter and DSLAM equipment, and unbundled switching combined with shared transport. And, if the loop that previously was part of the UNE-P is xDSL-capable, the ILEC must provide that loop as the xDSL-capable loop. This is precisely the manner in which Ameritech Illinois permits CLECs utilizing the UNE-P to engage in "line splitting."

For all the reasons discussed, the Commission should reverse the Proposed Order's adoption of the Staff and Joint CLEC proposed revisions to Ameritech Illinois' tariff language dealing with cross connects.

V. AMERITECH ILLINOIS PROPERLY INTERPRETED AND APPLIED THE REQUIREMENTS OF SECTION 13-801(d)(3)

Section 13-801(d)(3) states that, upon request, Ameritech Illinois "shall combine any sequence of unbundled network elements that it ordinarily combines for itself, including but not limited to, unbundled network elements identified" in the Draft I2A. Although that requirement directly violates federal law and is therefore preempted, the Company has, while not waiving any rights, revised its tariffs pursuant to that Section to state that, upon request, the Company will perform the work necessary to provide CLECs with 12 new UNE-P combinations which go beyond those listed in the Draft I2A and encompass all residential and business basic dialtone lines, ISDN lines, Centrex lines, and pay telephone lines. (Am. Ill. Ex. 1.0, p. 7; Am. Ill. Ex. 2.0, p. 19; Tr. 229-31). In addition, the Company has proposed a new tariff section under which

it will perform the work necessary to provide eight types of enhanced extended link ("EEL") combinations of unbundled local loops and unbundled dedicated transport, designed to enable CLECs with a single collocation arrangement to dramatically increase the number of potential local exchange service customers they can serve on a LATA-wide basis. (Am. Ill. Ex. 2.0, pp. 14- 22). The 20 new combinations being offered by the Company more than satisfy the demands made by CLECs for new combinations allegedly needed to fully compete in the residential and small business markets (Am. Ill. Ex. 2.0, pp. 19-22), and more than satisfy Section 13-801(d)(3).

To determine the list of new combinations for inclusion in the UNE-P and EEL under Section 13-801(d)(3) tariffs, it is necessary to take into account the limiting phrase "ordinarily combined," as well as the specific UNE combinations listed in the Draft I2A. For the reasons discussed in the Company's Initial Brief (pp. 20-23), Ameritech Illinois believes that at most the phrase should be construed to refer to UNEs combined to provide services offered to residential and small business customers on a widespread or mass market basis.

The Proposed Order (p. 56) rejects the Company's interpretation of the term "ordinarily combined." Instead, the Proposed Order adopts a definition of the term "ordinarily combined" developed on the basis of tariff language proposed by Staff for inclusion in the UNE-P and EELs tariffs. Specifically, as Ameritech Illinois understands the Proposed Order, it defines a requested combination of UNEs as "ordinarily combined" if it "is of a type ordinarily used or functionally equivalent to that used by the Company or the Company's end users where the Company provides local service," provided that the Company is not required to combine UNEs if: "(1) the Company does not provide services using such a combination of unbundled network elements ; (2) where the Company does provide services using such combinations, such provisioning is extraordinary (i.e., a limited combination of elements created in order to provide service to a

customer under a unique and non-recurring set of circumstances); or (3) an EELs [or other UNE][12] combination contains a network element that the Commission does not require the Company to provide as an unbundled network element." For the reasons discussed below, Ameritech Illinois takes exception to the Proposed Order's decision.

A. THE DEFINITION OF "ORDINARILY COMBINED" ADOPTED BY THE PROPOSED ORDER IS UNDULY BROAD

As the Proposed Order correctly recognizes, the combining requirement under Section 13-801(d)(3) is subject to two significant limitations: (1) all of the network elements for which a combination is requested must meet the "necessary" and "impair" tests for the unbundling of network elements, as specified in Section 251(d)(2) of the 1996 Act and FCC Rule 317; and (2) the requested combination must be a combination of unbundled network elements which the Company "ordinarily combines" for itself. (Prop. Order, pp. 57, 72). Thus, the Proposed Order correctly rejects the Joint CLECs' position that Section 13-801(d)(3) requires Ameritech Illinois to combine any network elements that the Company has ever combined for itself. As the Proposed Order states, the Joint CLECs' position "would simply write 'ordinarily' out of 'ordinarily combined,' and, in so doing, fail to give effect to all of the language of the statute . . ." (Prop. Order, p. 57).

[12] Although the quoted language was proposed of Staff for the EEL tariff and, therefore, refers to "an EEL combination," the Proposed Order (p. 57) concludes that this language should also be included in the Company's UNE-P tariff, as well. Accordingly, the Company interprets the Proposed Order as ruling that Ameritech Illinois is not required under Section 13-801(d)(3) to provide any requested combination of network elements (whether or not that combination can be characterized as an "EEL") if the combination contains a network element which the Commission does not require the Company to provide as an unbundled network element.

The Proposed Order, however, fails to recognize that Staff's proposal suffers from the same defect. Under the language proposed by Staff for its EEL tariff and adopted by the Proposed Order for both the EEL and UNE-P tariffs, the term "ordinarily combined" is essentially defined to mean any sequence of UNEs which the Company has ever combined for itself more than once. Staff's definition, like the one offered by the Joint CLECs, renders the term "ordinarily combines" virtually meaningless as a limitation on the combination requirement and, therefore, also effectively reads the word "ordinarily" out of the statute.

In support of its definition, Staff (Init. Br., p. 56) asserted that the term "ordinarily" should be "construed to bear upon the frequency and conditions under which Ameritech performs the work to combine particular UNEs, not the user or end user services to which those combinations are targeted." Staff's observation, however, begs the question of how "frequently" a particular sequence of UNEs must be combined in order for those UNEs to be "ordinarily" combined. The definition of "ordinarily combined" proposed by Staff, and adopted by the Proposed Order, implicitly assumes that if a sequence of UNEs is combined more than once, such a combination is performed "frequently" enough to be considered "ordinary." Staff's assumption, however, is no more supportable than a claim that, because the Chicago Cubs have made the playoffs three times in the last 20 years, the Cubs "ordinarily" make the playoffs.

Ameritech Illinois also takes exception to the Proposed Order's adoption of Staff's definition of "ordinarily combined" to the extent that it encompasses UNE combinations which are "functionally equivalent" to those "used by the Company or the Company's end-users." The term "functionally equivalent" does not appear in Section 13-801(d)(3) and its meaning was never explained by Staff.

B. THE COMPANY'S DEFINITION OF THE TERM "ORDINARILY COMBINED" IS BASED ON A REASONABLE INTERPRETATION OF THE STATUTE

The language of Section 13-801(d)(3) does not identify a particular degree of "frequency" with which a combination be must be performed in order to be "ordinarily combined," or otherwise define that term. Accordingly, it is appropriate to view the phrase "ordinarily combined" as a term of art which must be interpreted with the aid of extrinsic, as well as intrinsic, tools of statutory construction, including: (i) the meaning of the phrase as it was commonly understood, and as it was being defined by the CLECs, at the time that Section 13-801(d)(3) was enacted (see discussion supra); (ii) the definition of "ordinary" as applied in the context of telephony (Am. Ill. Init. Br., pp. 20-21); (iii) the goals of PA 92-22 to "encourage competition in the residential market and to declare the business market competitive" (Ryan Letter, p. 21); (iv) the evidence that the business market for high-speed dedicated point-to-point service is already highly competitive, as evidenced by the extensive fiber backbone facilities controlled by competitive carriers in the Chicago LATA (Am. Ill. Init. Br., pp. 33-34); and (v) a proper consideration of the statutory goals of promoting competition and investment and job creation in Illinois. These factors are discussed in more detail below.

First, Ameritech Illinois' understanding of the term "ordinarily combined" is entirely consistent with the meaning ascribed to that term by the Joint CLEC members in Docket 98-0396. In that docket, which was pending when the General Assembly enacted PA 92-22, the CLECs argued that Ameritech Illinois should be required to provide combinations of unbundled network elements which it "ordinarily combines" for itself. In support of their position, these parties focused entirely on the alleged need for new UNE combinations to provide "new and second lines" over the UNE Platform in order to have a full opportunity to compete for the provision of service offered on a "mass market basis." For example, Z-Tel Communications,

Inc. ("Z-Tel"), one of the Joint CLECs in this case, framed the issue in Docket 98-0396 as follows:

> First, Z-Tel submits that the Illinois Commerce Commission ("Commission") should require Illinois Bell Telephone Company ("Ameritech") to provide new as well as existing UNE combinations, including the UNE-P, by adopting an "ordinarily combined" standard to encourage mass market competition in Illinois. Second, Z-Tel demonstrates that Ameritech failed to comply with this Commission's order regarding the provision of unbundled local switching with interim shared transport ("ULS-ST").

(Post-Hearing Brief of Z-Tel Communications, Inc., Docket 98-0396, pp. 1-2) (administrative notice requested) (emphasis added). Similarly, AT&T and MCIWorldCom, also members of the Joint CLECs, stated the issue in Docket 98-0396 as follows:

> Ameritech's compliance with the TELRIC Order and the determination of appropriate rates, terms, conditions for non-recurring charges, shared transport and the UNE Platform need to be addressed and resolved to provide certainty with respect to pricing and a solid foundation on which CLECs can rely to serve residential and business customers on a mass market basis in Illinois.

(Initial Joint Brief of AT&T Communications of Illinois, Inc. and MCIWorldCom, Inc., Docket 98-0396, pp. 2-3) (administrative notice requested). Moreover, in the introductory paragraph of the section of their Joint Initial Brief in Docket 98-0396 specifically devoted to the issue of the "network elements" that Ameritech Illinois "ordinarily combines in its network," AT&T and MCIWorldcom stated as follows:

> There are two separate and distinct issues that the Examiner and the Commission must address – (1) whether Ameritech is currently obligated to provide UNE Platform for new customers, additional, and second lines and (2) if not, whether Ameritech can be ordered by a state commission to do so.

(Id., p. 4) (emphasis added).

The CLECs' use of the phrase "ordinarily combined" to refer to UNE-P combinations for the provision of mass market services was echoed in the Order issued in Docket 98-0396, where the Commission, citing Section 13-801(d)(3), concluded that Ameritech Illinois should be

required to provide CLECs with UNEs which the Company "ordinarily combines for itself or for the use of its end users." The Commission determined that the purpose of requiring Ameritech Illinois to provide "such combinations is to promote mass market competition for residential and small business customers." Order, Docket 98-0396 at 93 (emphasis added). The Commission further concluded that "this approach was recently adopted by the legislature in PA 92-22, which imposes the exact unbundling requirement ('combine any sequence of unbundled elements that it ordinarily combines for itself') that is imposed here." (Id.).

In short, the Company's interpretation of the term "ordinarily combined" as relating to combinations of UNEs to provide services offered to residential and small business customers on a "mass market" basis is fully consistent with the commonly understood meaning of the term at the time that Section 13-801(d)(3) was enacted. It is, therefore, reasonable to assume that the General Assembly had that meaning in mind when it enacted Section 13-801(d)(3). It is noteworthy that no party to Docket 98-0396 discussed the term "ordinarily combined" with reference to exchange private line, "point-to-point data services," or high speed data networks targeted to the medium and large business markets.

Second, the Company's interpretation of the term "ordinarily combined" is consistent with the common-sense English meaning of "ordinarily" as "commonly" or "frequently," as applied in the context of telephony. (Am. Ill. Ex. 2.0, p. 17; Am. Ill. Ex. 2.2, p. 5; Am. Ill. Ex. 8.0, pp. 29-30). As Mr. Alexander testified, for years, two broad categories of telecommunications services have been recognized – "POTS" and "specials." It is reasonable to consider "POTS" (i.e., plain old telephone service) as common or ordinary. Because of the mass-market nature of POTS, its elements (i.e., loop, dial tone, switching, etc.) can be ordinarily provisioned and combined without the need for special design or customization work. The

widespread use and demand for POTS means that the very same components that provided dial-tone to customer "A" on Monday can almost always be re-used (assuming the contiguous assembly of components was left intact) to provide service to customer "B" on Tuesday. In addition, POTS services, by far, are the most commonly requested services provisioned by Ameritech Illinois. On the other hand, "specials" are designed services that provide a customized transmission path to the end user, using various circuit enhancing electronics and/or loop conditioning. Such services are not generally considered "mass-market" products. (Am. Ill. Ex. 2.0, p. 20).

Third, an interpretation of the term "ordinarily combined" which focuses on the market for voice grade services to residential and small business customers is supported by the General Assembly's classification of all retail telecommunications services provided by Ameritech Illinois to business end users as competitive (220 ILCS 5/13-502.5) and Governor Ryan's observation that one goal of H.B. 2900 is "to encourage competition in the residential market, and to declare the business market competitive."[13] In this regard, Dr. Aron, an expert in economics and telecommunications, presented an analysis demonstrating that the market for high speed, dedicated point-to-point service in Illinois is highly competitive, as evidenced, in part, by the extensive fiber backbone facilities controlled by competitive carriers in the Chicago LATA. (See Section VI.B, infra.).

Fourth, as Dr. Aron explained, the term "competition" refers to a market process that maximizes consumer welfare, in the form of innovation, diversity of offerings and pricing, not a process whose main effect is simply to help some carriers and hurt others or to simply maximize

[13] Letter from Governor George H. Ryan to the Honorable Members of the Illinois House of Representatives, 92nd General Assembly, June 28, 2001, p. 2. (Hereafter "Ryan Letter"). (http://www.legis.state.il.us/legisnet/legisnet92/hb/920HB2900gms.html).

the number of nominal rivals. (Am. Ill. Ex. 8.0, pp. 11-12). Thus, requiring more UNE combinations simply for their own sake may very well impede competition rather than promote it.

Moreover, as discussed by the Company in its Initial Brief (pp. 21-22, 26-28), the Company's more focused interpretation of the term "ordinarily combined" takes into consideration the objectives of the PUA to facilitate investment and job creation in Illinois through the promotion of facilities-based competition. (See, e.g., 220 ILCS 5/13-102(f)) (identifying as legislative objectives "reduced prices for consumers, increased investment in communications infrastructure, creation of new jobs, and attraction of new businesses to Illinois"). (220 ILCS 5/13-103(f)) (articulating as a policy goal the "development and prudent investment in advanced telecommunications services and networks that foster economic development of the State"). As Dr. Aron testified, facilities-based competition provides (i) the incentive for the CLEC to shed its dependence on the ILEC; (ii) network redundancy that can contribute to the public health and welfare, especially during emergencies; (iii) the greatest opportunity and incentive for innovation of both services and operations; and (iv) the greatest opportunity to move from a regulated environment at the wholesale/network level to a market-based competitive environment. (Am. Ill. Ex. 8.1, p. 5). An unduly expansive interpretation of requirements of Section 13-801(d)(3), such as that espoused by Staff and adopted by the Proposed Order, would relieve CLECs of the need and the incentive to make investments in their own facilities, operations and expertise, thereby resulting in a less diverse network with attendant negative impacts on consumer welfare and public safety. (Am. Ill. Ex. 8.1, pp. 6, 29).

C. THE PROPOSED ORDER FAILS TO ADEQUATELY ADDRESS THE EVIDENCE AND POLICY ARGUMENTS SUPPORTING THE COMPANY'S INTERPRETATION OF SECTION 13-801(d)(3)

The Proposed Order fails to adequately address any of the evidence and arguments presented by the Company, as summarized above. Instead, the Proposed Order (p. 56) suggests that the promotion of facilities based competition should be of no concern to the Commission. This suggestion is contrary to the intent of the General Assembly, which recognized that undue dependence on the ILEC is inconsistent with the goal of maximizing competition. As part of PA 92-22, the General Assembly enacted a new section, §13-502(c), establishing five criteria to be considered by the Commission in determining whether to reclassify a service as "competitive." One of the criteria is "the extent to which other telecommunications companies must rely upon the service of another telecommunications carrier to provide telecommunications service." (220 ILCS 5/13-502(c)). The obvious premise of this provision is that the greater the reliance on the ILEC's facilities, the less meaningful is the competition it provides, and therefore, the less likely a service is to be reclassified as competitive, all else being equal. Thus, the General Assembly and FCC have recognized that the most substantial and welfare-enhancing form of competition is that resulting when carriers use their own networks, personnel, and expertise rather than relying on the incumbent's, and that is why the Commission is required to consider this factor when evaluating the competitiveness of a service. (Am. Ill. Ex. 8.0, p. 24).

The Proposed Order speculates that "at some point . . . CLECs will undertake the infrastructure investments necessary to serve their clients." (Prop. Order, p. 56). The Proposed Order, however, fails to explain why CLECs would have <u>any</u> incentive to invest in their own facilities if the Commission were to affirm the Proposed Order's conclusion that CLECs are entitled to rely exclusively on Ameritech Illinois for the <u>entire</u> network function, end-to-end, for

any services provided by the Company and at UNE/TELRIC rates rather than wholesale (i.e., resale rates). In fact, CLECs would have no such incentive if the Proposed Order's decisions are affirmed. CLECs would become nothing more than marketing operations, employing sales personnel or telemarketers who may be located in another state, with no need to (i) invest in infrastructure in Illinois or (ii) train or employ network engineers or technicians in any meaningful numbers. (Am. Ill. Ex. 8.0, p. 6). The harm that would result was succinctly stated by Dr. Aron:

> At some point the pretense that these CLECs are anything other than resellers of Ameritech Illinois services must be obvious to any impartial observer. When an ILEC creates a new telecommunications service and is forced to supply a parts list to CLECs who can say "me too," with no investment, no network facilities, no collocation, and no innovators or trained engineers or technicians, one has to wonder if the whole system has gone off its rails. This is competition only as total service resale is competition, but it should not be confused with the development of a robust, redundant, and modern telecommunications network in Illinois or with "maximum" competition for telecommunications services that promotes consumer welfare. The harm that this proposal creates extends to the entire investment climate in telecommunications assets in Illinois. After all, the facilities-based CLECs will be in competition with UNE-P resellers that use the ILEC's capital investment at forward looking, cost-based rates. Smart investors could be expected to shift their facilities investment dollars to other states, as CLECs can be expected to focus their facilities budgets (if any) on other states.

(Am. Ill. Ex. 8.0, p. 28).

In sum, the Proposed Order is directly at odds with the Illinois legislature's commitment to infrastructure investment, job creation and consumer welfare, as articulated in Sections 13-102(f) and 13-103(c) of the PUA. 220 ILCS 5/13-102(f), 13-103(c). In signing PA 92-22 into law, Governor Ryan urged the Commission to apply the new law in a manner consistent with that commitment:

> Some have expressed fears that House Bill 2900 may encourage new telecom operations to simply buy technology and services from existing companies and resell them, without making their own investments in technology and jobs in our State. I believe the Illinois Commerce Commission should be vigilant in its enforcement of the Act to ensure substantial investment by all telecommunication companies desiring to do business in our

> State. If entering companies are led to believe that they can prosper simply by "picking off" prime services from other carriers, perhaps at or below cost, then Illinois will have deprived itself of rational telecom regulation and discouraged, rather than encouraged, investment in technology and jobs in this State.

(Am. Ill. Ex. 2.1, pp. 32-33; Ryan Letter, p. 2). The fears expressed by Governor Ryan would be fully realized under the Proposed Order's decision to impose on Ameritech Illinois an essentially unlimited obligation to combine any network elements without requiring any actual activity by the CLEC other than to issue an order. In accordance with Governor Ryan's admonition that the Commission be "vigilant in its enforcement of the Act to ensure substantial investment by all telecommunication companies desiring to do business in our State," the approaches adopted by the Proposed Order should be rejected.

D. FEDERAL LAW PROHIBITS THE IMPOSITION OF ANY REQUIREMENT TO PROVIDE NEW UNE COMBINATIONS

The Proposed Order (p. 56) suggests that its unduly expansive interpretation of the requirement to provide new UNE combinations under Section 13-801(d)(4) is somehow dictated by the "scheme" established by the "United States Congress." Nothing could be further from the truth, as the 1996 Act imposes no obligation on an ILEC to combine <u>any</u> sequence of unbundled network elements on behalf of a CLEC, much less an obligation to combine every sequence of UNEs which the ILEC may have ever combined for itself more than once. Section 251(c)(3) of the 1996 Act requires only that an ILEC provide UNEs "in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." 47 U.S.C. 251(c)(3). The United States Court of Appeals for the Eighth Circuit, acting as a Hobbs

Act court,[14] vacated FCC Rules 315(c)-(f), which required ILECs to combine UNEs at the request of CLECs, holding that such rules "cannot be squared with Section 251(c)(3) of the Act." Iowa Utilities Board v. FCC, 120 F.3d 753, 813 (8th Cir. 1997) ("IUB I"). The Eighth Circuit later reaffirmed this holding, stating that "Congress has directly spoken on the issue of who should combine previously uncombined network elements. It is the requesting carriers who shall 'combine such elements.' It is not the duty of the ILECs." Iowa Utilities Board v. FCC, 219 F.3d 744, 758-59 (8th Cir. 2000) ("IUB III"), cert. granted (Jan. 22, 2001). The Court, therefore, concluded "[u]nder the first prong of Chevron, subsections [315](c)-(f) violate the plain language of the statute." Id.[15]

As previously discussed, Section 261(c) of the 1996 Act permits a State to impose only such requirements as are consistent with both the 1996 Act and the FCC's implementing regulations on an ILEC. A requirement that Ameritech Illinois perform the work of combining UNEs on behalf of a CLEC is inconsistent with both. Such a requirement is inconsistent with the 1996 Act because (1) under IUB I and III, the 1996 Act prohibits the FCC from imposing UNE combining requirements on ILECs and (2) if the Act prohibits the FCC from promulgating a given requirement, then a fortiori, the Act also bars a State from imposing that requirement, as the FCC has broader authority than State Commissions to interpret and apply the Act. E.g., GTE South Inc. v. Morrison, 199 F. 3d 733, 745 (4th Cir. 1999). Furthermore, given that the FCC's UNE combining requirements have been vacated and held illegal, a State law or rule that in substance reinstates the same FCC rules is patently inconsistent with the FCC's regulations, as

[14] The Hobbs Act requires appeals of FCC orders to be consolidated in a single circuit court rather than be heard by multiple circuits. The purpose of consolidating review of FCC orders in a single Hobbs Act court is to obtain uniformity and efficiency by having a single decision establish a national rule. Southwestern Bell Telephone Co. v. Arkansas Public Serv. Comm'n., 738 F.2d 901, 907 (8th Cir. 1984), vacated on other grounds, 476 U.S. 1167 (1998).

[15] The Supreme Court granted certiorari on this issue. The case has been briefed and argued and will be decided by the Supreme Court this Term.

those regulations do not and cannot include any UNE combining requirements. Thus, far from supporting the Proposed Order's determination that Ameritech Illinois has an obligation to combine any sequence of UNEs that the Company has combined more than once, the federal "scheme" represented by the 1996 Act preempts Section 13-801(c)(3) insofar as it requires Ameritech Illinois to combine UNEs on behalf of a CLEC.

Ameritech Illinois understands that the Commission may believe that it has no choice but to interpret Section 13-801(d)(3) as reflecting a legislative intent to require Ameritech Illinois to perform the work of combining at the request of CLECs certain UNEs that the Company "ordinarily combines" for itself, including but not limited to the UNE combinations listed in the draft I2A, and that one purpose of this proceeding is to determine the extent of that requirement. Ameritech Illinois also understands that the Commission may feel compelled to enforce Section 13-801(d)(3) despite the fact that a court would likely conclude, based on the holdings in IUB I and III, that Section 13-801(d)(3) is preempted by the 1996 Act.[16]

The Commission, however, need not, and should not, construe the requirements of Section 13-801(d)(3) as broadly as the Proposed Order does. For all the reasons discussed above, the Commission should reverse the Proposed Order and find that the 20 new UNE combinations being offered by the Company in its proposed UNE-P and EEL tariffs satisfy Section 13-801(d)(3).

[16] An appeal of the Eighth Circuit's holding in IUB III regarding new UNE combinations is currently pending before the United States Supreme Court. As indicated in the tariff which it filed in this proceeding, Ameritech Illinois filed the tariff under compulsion of the PUA, including as amended by PA 92-22, and specifically reserves any and all rights and remedies it may have related to the possible challenges to Section 13-801, including Section 13-801(d)(3), and the tariff under state and federal law, including federal preemption law.

VI. THE PROPOSED ORDER DOES NOT CORRECTLY RESOLVE ISSUES RELATED TO POINT-TO-POINT DATA SERVICES

A. THE PROPOSED ORDER'S CONCLUSION THAT THE COMPANY HAS AN OBLIGATION TO COMBINE UNES ON BEHALF OF CLECS FOR THE PROVISION OF POINT-TO-POINT DATA SERVICES IS NOT SUPPORTED BY SECTION 13-801

The Proposed Order (pp. 70-72) concludes that, pursuant to Section 13-801(d)(3), Ameritech Illinois should be required to combine at the request of CLECs sequences of unbundled loops and dedicated transport for the provision of "private line," or "point-to-point" data service. Ameritech Illinois takes exception to this conclusion for a number of reasons.

First, the conclusion is contradicted by Section 13-801(j), which expressly states that nothing in Public Act 92-22 should be construed to require the substitution of a "combination of network elements" for "special access services." 220 ILCS 5/13-801(j). It is undisputed that "special access" and "private lines" are functionally identical means of providing dedicated transmission services. (Am. Ill. Ex. 2.0, p. 20; Am. Ill. Ex. 9.0, p. 5). For the purposes of Section 13-801(j), there is no basis for treating "private lines" any differently than special access based upon the difference between the service name or label. (Am. Ill. Ex. 2.0, p. 20; Am. Ill. Ex. 2.1, pp. 60-61; Am. Ill. Ex. 9.0, p. 5). This conclusion was supported by the testimony of Mr. David Gebhardt, the only witness in this proceeding who had extensive involvement in the legislative process which led to the enactment of Section 13-801. (Am. Ill. Ex. 9.0, pp. 2, 5).

Moreover, as previously discussed, the General Assembly is presumed to know existing law, including the body of law existing in administrative regulations. Citizens Utility Co. of Illinois v. Illinois Pollution Control Board, 133 Ill. App. 3d 406 (1985); People v. Warren, 173 Ill. 2d 348 (1996). Section 790.10 of the Commission's existing interconnection rules defines the term "special access" as follows:

> Special access or private line means a transmission path that connects customer designated premises directly through a local exchange carrier's hub or hubs where bridging or multiplexing functions are performed, or to connect a customer designated premises and a serving office, and includes all exchange access utilizing the local exchange carrier and office switches.

83 Ill. Admin. Code § 790.10 (Am. Ill. Ex. 2.1, p. 60).[17] As a matter of statutory construction, therefore, the term "special access" as used in Section 13-801(j) should be construed to mean any "transmission path" which falls within the definition set forth in 83 Ill. Admin. Code § 790.10. It should be noted that Section 790.10 does not define "special access" in the narrow manner suggested by Staff as being limited to dedicated high capacity facilities that "run directly between the end user, usually a large business customer, and the IXC's point of presence." (Staff Init. Br., p. 62). To the contrary, the term "special access" is defined in Section 790.10 broadly enough to include the high capacity private line and "point-to-point data circuits" addressed in the Proposed Order.[18]

The conclusion that Section 13-801(j) should be construed to encompass so-called "point-to-point data circuits" and, therefore, that Section 13-801(d)(3) does not govern requests for new combinations of UNEs which comprise a "point-to-point data circuit," is also supported by the rule that a statute be interpreted in a manner which does not render it unconstitutional or otherwise invalid. As previously discussed, the plain language of the 1996 Act does not permit any requirement that ILECs perform the functions necessary to combine UNEs for CLECs. Iowa Utils. Bd. v. FCC, 219 F. 2d 744, 754 (8th Cir. 2000) ("IUB III"). Based on the holding of IUB

[17] This definition of "special access" and "private line" was recently affirmed by the Administrative Law Judge's Proposed Order issued in Docket 99-0511. (Am. Ill. Ex. 2.1, p. 61).

[18] The Proposed Order (pp. 70-71) contends that, because Part 790 is "directed to issues of interconnection, it is quite unlikely that any party raised issues of unbundling obligations when the definition was proposed." For purposes of analyzing legislative intent, however, the General Assembly is presumed to have been aware of the Commission's definition of "special access" and, therefore, in the absence of a contrary statutory definition, should be presumed to have adopted the Commission's definition. Whether or not any parties to the proceeding in which the definition was adopted "raised issues of unbundling" is beside the point.

III, the FCC, in its UNE Remand Order[19], expressly declined to require ILECs to combine UNEs to create an EEL at the request of a CLEC. (UNE Remand Order,¶ 480). In this context, the FCC defined an EEL to include an unbundled loop, multiplexing/concentrating equipment and dedicated transport, i.e., the same unbundled network elements which Ameritech Illinois would be required to combine on behalf of a CLEC under the terms of the Proposed Order's decision regarding point-to-point data services. (UNE Remand Order, ¶ 480). Accordingly, the Proposed Order's requirement that Ameritech Illinois combine UNEs to create point-to-point data circuits at the request of a CLEC is inconsistent with (an in fact violates) and is therefore preempted by the 1996 Act and the FCC's regulations.

Even if the Commission concludes that Section 13-801(j) does not exempt all loop-dedicated transport UNE combinations used to provide private line service from the requirements of Section 13-801 (and it does, for the reasons discussed above), Ameritech Illinois is not required to provide such new combinations pursuant to Section 13-801(d)(3). For the reasons discussed in Section V, supra, the term "ordinarily combined," as used in Section 13-801(d)(3), can at most be construed to refer to combinations of UNEs used to provide services offered to residential and small business customers on a widespread or mass market basis. It is undisputed that private line service is not such a service.

In support of its conclusion that UNE combinations used for "point-to-point data services," do fall within the meaning of "ordinarily combined," the Proposed Order relies on its decision to adopt Staff's definition of the term "ordinarily combined" which encompasses every sequence of UNEs which the Company has never combined more than once. For the reasons previously discussed, the Proposed Order's decision in this regard would effectively eliminate

[19] In the Matter of Implementation of the Local Competition Programs of the Telecommunications Act of 1996, Third Report and Order, CC Docket No. 96-98, (Released November 5, 1999).

the term "ordinarily" as a limitation on the Company's obligation to provide new UNE combinations and should, therefore, be rejected.

Moreover, the evidence shows that a requirement that the Company provide new combinations of UNEs for the provision of "point-to-point" data circuits would be inconsistent with the highly competitive nature of the market for high speed facilities and dedicated transport services in Illinois. Based on data from 1998, Ameritech Illinois has only 6% of the retail business for Chicago HICAP service and, with respect to underlying facilities, Ameritech Illinois' competitors control almost half of that business. (Am. Ill. Ex. 8.1, p. 9). Also, based on a 1999 analysis of high capacity costs and revenues, Dr. Aron found that CLECs with existing backbone fiber facilities would be able to profitably build point-to-point spurs to nearly three quarters of Ameritech Illinois' actual customer locations in the Chicago LATA, accounting for over 90% of Ameritech Illinois' high capacity service revenues. (Am. Ill. Ex. 8.1, p. 10; Tr. 153-55).

Accordingly, a requirement that Ameritech Illinois provide CLECs with new high speed, dedicated "point-to-point" UNE combinations at TELRIC-based rates is not appropriate. Such a requirement, Dr. Aron testified, would be contrary to the public interest because it would devalue the competitive fiber capacity already in place, and require those CLECs who made an investment in such facilities to compete with CLECs that could in turn purchase the service of Ameritech Illinois at TELRIC based prices. (Am. Ill. Ex. 8.1, pp. 10-11). This would (i) eliminate any incentive for CLECs to build their own facilities and for competitive transport providers to expand and enhance their existing networks, and (ii) effectively devalue those CLECs that have already made investments in Illinois. Accordingly, the Proposed Order's decision with respect to "point-to-point" data circuits is contrary to the legislative objectives of

promoting infrastructure and investments, job creation and consumer welfare, as well as Governor Ryan's admonition that the Commission be "vigilant" in applying PA 92-22 in a way that will encourage, rather than discourage, investment and technology and jobs in Illinois. (Am. Ill. Ex. 2.1, pp. 32-33).

The Proposed Order also concludes that a requesting carrier "may also order a network elements platform consisting of unbundled loop and dedicated transport to provide point-to-point data service" under Section 13-801(d)(4). For the reasons fully discussed in Section II, above, the Proposed Order's decision in this regard is based on an erroneous interpretation of Section 13-801(d)(4), would lead to absurd results, and should be rejected.

B. THE COMMISSION SHOULD APPROVE THE COMPANY'S POLICY WITH REGARD TO CONVERSIONS OF PRIVATE LINE SERVICE TO UNE COMBINATIONS

In its discussion of "point-to-point data circuits," the Proposed Order fails to clearly distinguish the question of (i) whether Ameritech Illinois can be required to perform the work of combining UNEs on behalf of a CLEC to create "point-to-point data circuits," from (ii) the separate question of whether Ameritech Illinois can be required to provide a CLEC with any existing UNE loop-transport combination used to provide a point-to-point, or private line, service. For the reasons discussed above, Section 13-801 should not be interpreted as requiring the Company to provide new loop-transport combinations beyond the eight EEL combinations specifically identified in the I2A. With respect to the second question, however, Ameritech Illinois made it clear that, if a carrier is already purchasing a tariff "private line" service that is entirely local in nature, the carrier may convert that circuit to UNEs for the provision of point-to-point data service pursuant to FCC Rule 315(b). 47 CFR § 51.315(b). Moreover, Ameritech Illinois will fill requests for the conversion of existing UNE loop-transport combinations used to

provide non-local private line service if the requesting carrier certifies that it meets one of the three local usage criteria established by the FCC in the Supplemental Order Clarification. (Am. Ill. Reply Brief, p. 31).

In its Initial Brief (Staff Init. Br., pp. 67-69), Staff asserted that the tariff proposed by the Company for the conversion of special access service to UNE combinations (Il. CC No. 20, Part 19, Section 19 ("Section 19")) does not encompass terms and conditions for migration of private line service to UNEs. In response, the Company explained that, under Section 13-801(j), it is federal law, not state law, that governs the substitution of UNE combinations used to provide "special access," which, as broadly defined in 83 Ill. Admin. Code Section 790.10, is synonymous with "private line" and includes "any transmission path that connects customer-designated premises directed through a [ILEC's] hub or hubs, where bundling or multiplying functions are performed." Federal law establishes well-defined criteria for this conversion and a tariff is not a prerequisite for accepting a CLEC's request to convert qualifying special access services or private line services to UNE loop-transport arrangements. Nonetheless, in order to address Staff's concerns, the Company proposed revisions to Section 19 to explicitly establish terms and conditions applicable to the conversion of existing private line service to UNE loop-transport combinations. Those revisions are included in the draft tariff attached to the Company's Reply Brief. As indicated in Section 19, as revised, an existing private line circuit that is entirely local in nature will be converted to combinations of UNEs without reference to the local usage test set forth in the Supplemental Order Clarification[20].

In their briefs, Novacon and Staff both suggested that the local usage criteria established in the Supplemental Order Clarification do not apply to requests for the conversion of non-local

[20] In the Matter of Implementation of the Local Competition Programs of the Telecommunications Act of 1996, Supplemental Order Clarification, 15 FCC Rcd. 9587 (2000).

point-to-point data circuits which are not used to provide "special access" services, a term narrowly defined by Staff to include only those loop-dedicated transport facilities connecting a customer's premises to an interexchange carrier's ("IXCs") point-to-presence ("POP"). (Novacon Init. Br., pp. 10-16; Staff Init. Br., pp. 64-66). The Proposed Order (p. 70) appears to adopt this position, concluding that the Supplemental Order Clarification "does not mandate identical treatment" of special access and private line services. To the extent that this conclusion is intended as a finding that Ameritech Illinois must convert non-local private line service to UNE combinations without regard to the FCC's local use restrictions, Ameritech Illinois disagrees and takes exception to that finding. In the Supplemental Order Clarification, the FCC evaluated the use of loop-transport combinations used, not merely in the market for "special access" service, as defined by Staff, but "more generally, in the exchange access market of which the special access market is a subset." Supplemental Order Clarification, ¶¶ 10, 3, 13 et. seq. Exchange access services are defined as services provided between exchange areas. 47 U.S.C. Sections 153(16), (48). Special access circuits and private line circuits can be used in this manner, and thus both are subject to the Supplemental Order Clarification's local usage test if such circuits are used on any basis other than a purely local one.

The Proposed Order (p. 70) suggests that the sole basis for the FCC's "local usage" restrictions was its concern for special access revenues, and, therefore, that those restrictions do not apply to the non-local private line conversions. As the Company discussed in its Initial Brief (p. 59) and Reply Brief (p. 38), however, the FCC also made it clear that its restriction on the use of loop-transport combinations is supported by additional considerations which clearly do apply to conversions of private line service. Supplemental Order Clarification, ¶ 8.

First, the FCC concluded that application of the local usage test to requests for combinations of loop and transport facilities is justified on the grounds that there is not yet sufficient evidence to conclude that a denial of access to such elements in the "exchange market" (as opposed to the "local exchange market") meets the "impair" test required by Section 251(d)(2) of the 1996 Act. The FCC recognized that, although it had conducted a general "impair" analysis of loops and dedicated transport and ordered those elements unbundled, its analysis did not fully focus on an application of the "impair" test to the exchange market, with the limited exception of entrance facilities. Supplemental Order Clarification, ¶ 13, 14. The FCC concluded that it must "gather evidence in the development of the marketplace for exchange access in the wake of the new unbundling rules adopted in the Third Report and Order before we can determine the extent to which denial of access to network elements would impair a carrier's ability to provide special access services." Supplemental Order Clarification, ¶ 16.

Second, the FCC expressed concern that "an immediate transition to unbundled network element based special access could undercut the market position of many facilities based competitive access providers." The Proposed Order (p. 70) asserts that this aspect of the Supplemental Order Clarification should be ignored because "no competitive access provider has come forward to oppose the unbundling from which we infer that no competitive impact in that market is likely." Aside from the fact that Commission decisions must be based on the record evidence, and not on an inference drawn solely from the absence of particular intervenors, the Proposed Order's statement misses the point. The FCC's concern regarding the impact that an additional unrestricted requirement could have on facilities-based competitive access providers supports the conclusion that the FCC intended the local usage restrictions to apply to any and all conversions of loop-dedicated transport combinations used in the provision of non-local service,

whether or not that combination terminates at an IXC POP. Because the FCC's local use restrictions are mandatory and can be removed only be the FCC (see Section VIII, infra), they apply whether or not this Commission shares the FCC's concerns (although there is no valid reason why the Commission should not).

For all the reasons discussed, the Commission should amend the Proposed Order to approve the Company's policy, as reflected in proposed tariff Section 19, governing the conversion of private line, or point-to-point data, service to UNEs.

VII. AMERITECH ILLINOIS' PROPOSED EELS TARIFF SHOULD BE APPROVED

Ameritech Illinois proposed a new tariff section under which the Company would perform the work necessary to provide the eight types of enhanced extended link ("EEL") combinations listed in the Draft I2A and the Interim Compliance Tariff. (Ill. CC No. 20, Part 19, Section 20 ("Section 20")). As defined in the Company's tariff, an EEL is new combination of unbundled local loops and unbundled dedicated transport, with appropriate multiplexing, which enables a CLEC with a collocation arrangement to serve customers in another Ameritech Illinois central office within the LATA without establishing collocation arrangements in each central office. A CLEC with a limited collocation presence can dramatically increase the number of potential customers it can serve by using the EEL to transport unbundled local loops, from other central offices within the LATA, back to its collocation arrangement. (Am. Ill. Ex. 2.0, pp. 13-14).

The Proposed Order addresses certain issues related to Ameritech Illinois' proposed EEL tariff which are discussed below.

A. SWITCHED CIRCUIT RESTRICTIONS

The Proposed Order concludes that Ameritech Illinois' proposed EEL tariff improperly limits EELs to circuit switched or packet switched applications, a restriction which the Proposed Order states is "trumped by the obligation of Section 13-801(d), requiring Ameritech to provide nondiscriminatory access to network elements 'for the provision of an existing or new telecommunications service,' without creating a distinction between voice and data services." (Prop. Order, p. 74). The Proposed Order's statement is unsupported. Ameritech Illinois' tariffs do not restrict a CLEC's access to unbundled network elements for the provision of voice or data service and, therefore, do not violate Section 13-801(d). The Company's proposed EELs tariff deals with the combinations of loop and dedicated transport which the Company will combine on behalf of a CLEC. The "circuit switched or packet switched" restriction is an integral condition of the EEL combinations listed in the Draft I2A and, therefore, comports precisely with Section 13-801(d)(3)'s directive to provide those combinations. (Am. Ill. Ex. 2.2, p. 13).

The Proposed Order, however, asserts that Ameritech Illinois' "state obligations" are not "limited to the EEL combinations found in the I2A" because the "I2A unbundled network element combinations that Ameritech Illinois must combine at the request of carriers are the minimum number of such combinations" and there "is no limitation on additional combinations, such as combinations of loop and dedicated transport without any switching function." The Proposed Order's statements in this regard reflect an incorrect reading of Section 13-801(d)(3). That Section does not require that the Company provide new EEL combinations that include but are not limited to the eight EEL combinations listed in the Draft I2A. Rather, that Section provides that Ameritech Illinois is to combine unbundled network elements that it "ordinarily combines for itself, including but not limited to, unbundled network elements identified in the"

Draft I2A. The Draft I2A includes UNE-P, as well EEL, combinations. As previously discussed, the twelve UNE-P combinations listed in Section 15 of the Company's proposed tariffs include, but are not limited to, the UNE-P combinations listed in the Draft I2A. Accordingly, Ameritech Illinois' proposed tariffs fully comply with the requirements of Section 13-801(d)(3).

Furthermore, the Proposed Order (p. 74) is incorrect in stating that "there is no limitation on additional combinations, such as combinations of loop and dedicated transport without any switching function." As previously discussed, Section 13-801(j) clearly provides that nothing in Section 13-801 should be construed to require the substitution of loop and dedicated transport UNEs for special access service which, as previously discussed, means a "transmission path that connects customer designated premises . . ." 83 Ill. Admin. Code Section 790.10. Accordingly, Section 13-801(d)(3) cannot be interpreted as requiring Ameritech Illinois to provide combinations of loop and dedicated transport to be used in substitution of special access service.

B. TERMINATION OF EELS

The Proposed Order rejects the provision of the Company's proposed EELs tariff which would require a CLEC to be collocated in at least one central Company office in order to obtain a new EEL. In support of this decision, the Proposed Order states that "Section 13-801(d)(3) speaks only to Ameritech Illinois' obligation to combine the I2A combinations but is silent in respect to the restrictions and conditions that were included in that document, which are only now being reviewed by the Commission." The Company disagrees with this analysis. The General Assembly should be presumed to have reviewed the Draft I2A and been aware of its contents when it included a specific reference to the Draft I2A combinations in Section 13-801(d)(3). Under the Draft I2A, an EEL is defined as a combination of an unbundled local loop

and unbundled dedicated transport, with the transport terminating at a CLEC's collocation arrangement. (Am. Ill. Ex. 2.1, p. 56; Am. Ill. Ex. 2.2, pp. 12-13). Accordingly, the collocation requirement is not simply an ancillary term and condition for the use of the EELs supplied in the Draft I2A; to the contrary, it is an inherent part of the definition of the EEL combinations listed in the Draft I2A and incorporated by reference into Section 13-801(d)(3).

The Proposed Order further states that "the FCC has specifically recognized in the definition of dedicated transport (which is one of the UNEs that make up an EEL) that it may terminate in places other than a collocation arrangement" and that the Commission has "no reason to depart from the FCC's definition." This statement misses the point. Ameritech Illinois fully complies with its obligation to provide UNE dedicated transport in accordance with the FCC's rules and pursuant to its interconnection agreements and tariff. In accordance with the FCC's rules, Ameritech Illinois does not require that UNE dedicated transport terminate in a collocation arrangement. (See e.g., Ill. CC 20, Part 19, Section 12, Sheet 3). As previously discussed, however, the FCC has expressly stated that its rules do not require the provision of new EELs under any circumstances. (UNE Remand Order, ¶ 480). Accordingly, there is no logical basis for the Proposed Order's finding that Ameritech Illinois' offering of new EELs subject to the collocation requirement violates federal law.

Furthermore, the Company would note that, while it has no federal obligation to provide new EELs, the FCC has ruled that its conclusion that competitors are not impaired in certain circumstances without access to unbundled switching in density zone 1 in the top 50 MSAs is predicated upon the availability of the EEL. (UNE Remand Order, ¶ 288). In this context, the FCC has defined the EEL and its purpose in precisely the same manner as the Company proposes in this case:

> [T]he EEL allows requesting carriers to serve a customer by extending a customer's loop from the end office serving that customer to a different end office in which the competitor is already collocated. The EEL, therefore, allows requesting carriers to aggregate loops at fewer collocation locations and increase their efficiencies by transporting aggregated loops over efficient high capacity facilities to their central switching location. Thus, the collocation can be diminished through the use of the EEL.

(Id.) (emphasis added). Moreover, two of the three "safe harbor" provisions in the local usage requirements of the Supplemental Order Clarification (¶ 22) expressly require collocation.

Thus, there is no basis for the Proposed Order's characterization of Ameritech Illinois' stated rationale for providing EELs as "self serving and self authored" (Prop. Order, p. 78). The eight EEL combinations in the Draft I2A serve the purposes identified by the FCC in the UNE Remand Order: to enable CLECs with a single collocation arrangement to increase the number of potential customers it can serve by using an EEL to transport unbundled local loop traffic from distant central offices within the LATA back to its collocation arrangement. For the reasons fully discussed in Section V, supra, the Proposed Order's overly broad interpretation of Section 13-801(d)(3) as requiring the Company to provide new EEL (i.e., loop-dedicated transport) combinations beyond those included in the Draft I2A is inconsistent with the legislative objectives of promoting competition, infrastructure and developments, job creation and consumer welfare.

At the conclusion of its discussion of the EEL termination requirement, the Proposed Order (p. 78) states that "[w]e adopt the language of the Joint CLECs' proposed tariff." It is unclear, however, exactly what portion of the Joint CLECs' proposed tariff language the Proposed Order intends to adopt. Moreover, in another section, the Proposed Order appears to adopt the EELs tariff proposed by Staff, subject to specifically identified modifications. ("Our review of the parties' proposals leads us to accept Staff's proposed tariff language addressing the provisioning of new and existing combinations of EELs and the obligation to not unbundled [sic]

currently combined UNEs." (Prop. Order, p. 85)). While Ameritech Illinois takes exception to the Proposed Order's decision to adopt Staff's, rather than the Company's, proposed EELs tariff, Staff's proposal is preferable to the Joint CLECs', for the reasons fully discussed in Ameritech Illinois' Initial Brief (pp. 58-67). Indeed, the Proposed Order expressly rejects certain of Joint CLECs' proposals reflected in its proposed EEL tariff, including the RAC and shared usage proposals. (Prop. Order, pp. 86, 149).

C. NEW AND EXISTING COMBINATIONS

Ameritech Illinois takes exception to the Proposed Order's decision (p. 85) to accept Staff's proposed tariff language addressing the provisioning of new and existing combinations of EELs. For the reasons fully discussed by the Company in its Initial Brief (pp. 50-53), Ameritech Illinois believes that its EELs tariff (Section 20) should be limited to the terms and conditions under which Ameritech Illinois will combine loop and dedicated transport UNEs on behalf of CLECs for the creation of new EELs.

The Proposed Order alludes to Staff's concern that the tariff proposed by the Company for the conversion of special access service to UNE combinations (Section 19) does not encompass terms and conditions for migration of private line service to UNEs. As previously discussed, under Section 13-801(j) it is federal law, not state law, that governs the substitution of UNE combinations for special access in private line service. Federal law establishes well-defined criteria for this conversion and a tariff is not a prerequisite for accepting a CLEC's request to convert qualifying special access services or private line services to UNE loop-transport arrangements. Nonetheless, in order to address Staff's concerns, the Company proposed revisions to Ill.C.C. No. 20, Part 19, Section 19 to explicitly establish terms and conditions applicable to the conversion of existing private line service to UNE loop-transport

combinations. Those revisions are included in the draft tariff attached to Ameritech Illinois' Reply Brief. Accordingly, Ameritech Illinois' proposed tariffs contain terms and conditions which address both new and existing EELs and there is no reason to adopt Staff's proposal to conflate these two separate issues into one tariff section.

VIII. THE COMMISSION SHOULD MODIFY THE PROPOSED ORDER'S CONCLUSIONS REGARDING THE FCC'S MANDATED LOCAL USAGE RESTRICTIONS

Ameritech Illinois, Staff and the Joint CLECs each proposed language indicating that a telecommunications carrier may only request an EEL for the provision of interexchange access service when the carrier can certify, and does so in writing, that the telecommunications carrier uses that EEL arrangement to provide a significant amount of local exchange service to its end user customer pursuant to the criteria set forth by the FCC in its Supplemental Order Clarification, as may be clarified or modified in subsequent FCC orders. Unlike the Staff and Company proposals, however, the Joint CLECs' proposed tariff specifies this provision as "interim." (Jt. CLEC Ex. 2.0, p. 2, Sch. JPG-2, Orig. Sheet No. 6). The Joint CLECs proposed that the Commission immediately establish a separate proceeding to address the applicability of the local use test to EELs.

As previously discussed, the Proposed Order appears to approve Staff's proposed EEL Tariff, with some modifications and, therefore, appears to adopt Staff's proposed language addressing the FCC's local usage restrictions. The Proposed Order, however, also adopts the Joint CLECs' proposal that a separate proceeding be initiated "in the near term" to revisit the "matter" of the local usage restrictions "from an evidentiary and policy perspective." For the reasons discussed below, Ameritech Illinois takes exception to these decisions. The Commission

should (i) adopt the proposed tariff language related to the FCC's local usage restrictions, as reflected in the Company's proposed tariff Sections 19 (conversion of special access circuits and private lines to UNEs) and 20 (provision of new EELs); and (ii) reject the CLECs' request to initiate a new proceeding.

A. THERE IS NO NEED FOR THE COMMISSION TO INITIATE A NEW PROCEEDING TO ADDRESS THE FCC'S MANDATORY LOCAL USAGE RESTRICTIONS

The Proposed Order (p. 75) incorrectly suggests that all of the parties agree that the "issue of the local traffic test" should be reviewed again in another proceeding. In fact, Ameritech Illinois made clear its position that there is no need for the Commission to initiate such a proceeding at this time and that the incorporation of the FCC's mandatory local usage test into the tariff provision governing the provision of unbundled loop-dedicated transport (so-called "EELs") should not be characterized as "interim." (Am. Ill. Reply Br., pp. 25-30). In contrast to the other portions of the Proposed Order which set forth detailed summaries of the parties' positions on various issues, the section of the Proposed Order (pp. 74-75) addressing the "local usage test" fails to adequately summarize Ameritech Illinois' position on this matter.

As the Company explained, under the FCC's Supplemental Order[21] to the UNE Remand Order, "the conversion of special access to EELs is unquestionably lawful where CLECs use special access circuits to provide a significant amount of local exchange traffic, but is unlawful where this condition is not met." In the Supplemental Order (¶ 2) the FCC held that:

> until resolution of our Fourth FNPRM, . . . interexchange carriers (IXCs) may not convert special access services to combinations of unbundled loops and transport network elements, whether or not the IXCs self-provide entrance facilities (or obtain them from third parties). This constraint does not apply if an IXC uses combinations of unbundled network elements to provide a significant amount of local exchange service, in addition

[21] Supplemental Order, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, FCC No. 99-370 (Released Nov. 24, 1999).

to exchange access service, to a particular customer.

In the Supplemental Order Clarification (¶ 8) the FCC reaffirmed this clear rule: "[U]ntil we resolve the issues in the *Fourth FNPRM*, IXCs may not substitute an incumbent LEC's unbundled loop-transport combinations for special access services unless they provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer." (Emphasis added). The FCC also specifically defined the three circumstances under which a requesting carrier is considered to be providing a "significant amount of local exchange service" to a particular customer. Supplemental Order Clarification, ¶ 22.

One basis (but not the only basis) for the FCC's requirements was its concern that allowing CLECs to immediately substitute UNEs for special access arrangements would interfere with the FCC's plans for reform of interstate special access charges and universal service by allowing a flashcut of a huge number of special access services to much lower-priced UNE combinations. Such an upheaval could have "significant policy ramifications" for interstate access reform and universal service. Id., ¶ 2. As previously discussed, other factors central to the FCC's imposition of the local use restrictions were (i) a recognition that there is currently insufficient evidence to conclude that denying CLECs access to unbundled loop and dedicated transport elements would "impair" their ability to compete in the "exchange market" (as opposed to the "local exchange market"); and (ii) a concern that "an immediate transition to unbundled network element special access could undercut the market position of many facilities based competitive access providers." Supplemental Order Clarification, ¶¶ 16, 18.

The FCC made clear that the restrictions it created are mandatory and must stay in place until it completes the Fourth Further Notice of Proposed Rulemaking ("Fourth FNPRM"). Id., ¶¶

8, 21 (referring to the "temporary constraint" that CLECs "must" meet the requirements it has created) (emphasis added); Supplemental Order, ¶ 2 (CLECs "may not" convert special access to UNEs without meeting FCC requirements) (emphasis added). The Fourth FNPRM proceeding is not yet complete. Indeed, the FCC recently reiterated that the special access conversion requirements are still in full force in Net2000 Comms, Inc. v. Verizon, FCC File No. EB-00-018, FCC 01-381, ¶ 33 (Released Jan. 9, 2002) (finding that Verizon was justified in refusing to convert certain special access circuits to EELs; the requested circuits were "ineligible for conversion because those circuits were subject to the significant amount of local exchange service requirement articulated in our *Supplemental Order* and . . . our *Supplemental Order Clarification*") and in the UNE NPRM[22], ¶ 71 (noting the continued "safe harbor provisions" on "requesting carriers' access to EEL combinations"). The issues in the Fourth FNPRM have now been incorporated into the UNE NPRM, which was initiated on December 20, 2001. UNE NPRM, ¶ 12.

The Proposed Order (p. 75) refers to the Joint CLECs' argument that "in Illinois, there is no conceivable linkage between universal service (or any social policy) [in] limiting an entrant's use of an EEL." This is an apparent reference to the argument made by AT&T and MCIWorldCom in Docket 98-0396 that because "the Illinois Commission has already addressed access charge reform [in the Intrastate Access Charge Reform Order (Docket Nos. 97-0516, 97-060, 97-0602 (Cons.)] and is ahead of the FCC in this respect," the Commission may ignore the FCC's requirements. (Jt. CLEC Br. on Exc., pp. 2-4, Docket 98-0396). The Intrastate Access Charge Reform Order, however, dealt exclusively with switched access charges, not special access charges, and it is special access charges that are relevant in the context of EELs.

[22] Notice of Proposed Rulemaking, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Dockets 01-338, 96-98, and 98-147, FCC 01-361 (Released Dec. 20, 2001) ("UNE NPRM").

Moreover, the FCC's restrictions on the conversion of pre-existing, loop-transport circuits to EELs clearly apply, by their express terms, until such time as the FCC completes its evaluation of national policy issues in the Fourth FNPRM proceeding, not until a state completes its own intrastate access charge reform. Supplemental Order Clarification, ¶ 8 ("until we resolve the issues in the *Fourth FNPRM*, IXCs may not substitute an [EEL] for special access services unless they provide a significant amount of local exchange service"). Simply put, there is no way that any state commission could be "ahead of the FCC," as AT&T and WorldCom claimed, with respect to the FCC's own ongoing rulemakings.[23]

The Joint CLECs' reliance on the Intrastate Access Charge Reform Order is also baseless because it conflicts with the Commission's own subsequent decisions. The Commission has repeatedly recognized that the restrictions established by the FCC in the Supplemental Order and the Supplemental Order Clarification are binding rules to which the Commission must adhere. E.g., Focal Arbitration Award, Docket 00-0027 at pp.12-15 (May 8, 2000) (Applying FCC orders because "[h]ere, the FCC, for whatever reason, has tied the LEC's obligation to unbundle a special access circuit to the CLEC's obligation to provide significant amounts of local exchange service to a particular customer."); TDS Arbitration Award, Docket 01-0338 at p. 17 (Aug. 8, 2001) ("The Commission agrees with Ameritech on the point that the FCC [in the Supplemental Order Clarification] prohibits CLECs from combining UNEs with ILEC's tariffed services (except collocation)"); Level 3 Arbitration Award, Docket 00-0332, at 24 (August 30,

[23] Even if the Commission were to accept the Joint CLECs' arguments, the Commission's authority could be to remove the FCC's restriction for intrastate special access arrangements only, as those would be the only arrangements for which access charge reform had theoretically been "completed" and over which this Commission has any jurisdiction. That, of course, would lead to even more complexity in this area, as many circuits are used for both interstate and interstate special access, and are formally designated as interstate if more than 10% of the traffic they carry is interstate. See Supplemental Order Clarification, ¶ 26, n. 75.

2000) (holding that "in accordance with the Supplemental Order Clarification, CLECs must self-certify their compliance with the local use requirements").

The Proposed Order (p. 75) also notes the Joint CLECs' argument that "the Commission Order in Docket 98-0396, now on rehearing [sic], rejects Ameritech's position that EELs must conform to a 'predominantly local' test." This assertion is wrong. In fact, the Order issued on October 16, 2001 in Docket 98-0396 does not even address the issue. Moreover, the Commission declined to adopt replacement language proposed by AT&T/MCI in their Joint Brief on Exceptions (pp. 2-3) in Docket 98-0396 which would have expressly adopted the AT&T/MCI position that Ameritech Illinois should be required to make EELs generally available as UNEs without regard to the local use limitations imposed by the FCC. An issue currently addressed on reopening in Docket 98-0396 is whether the FCC's limitations should apply to EELs on an interim basis pending a final decision in this case. The Company and Staff have filed briefs on reopening explaining that, for the reasons discussed above, the Commission may not disregard the FCC's Supplemental Order and Supplemental Order Clarification even on an interim basis.

The Proposed Order (p. 75) states that the Commission should "at this time again assert our jurisdiction over the issue." As indicated by the decisions discussed above, however, the Commission has never "asserted" jurisdiction to second-guess the FCC's mandated local use restrictions, and properly so. Moreover, there has been no change in law since those decisions. To the contrary, Section 13-801(j) expressly states that PA 92-22 has no impact on the substitution of UNEs or combinations of UNEs for special access service.

B. STAFF'S PROPOSED TARIFF LANGUAGE IMPROPERLY RESTRICTS APPLICATION OF THE FCC'S MANDATED LOCAL USE RESTRICTIONS

As previously discussed, the Commission appears to have adopted the Staff's proposed EEL tariff with certain modifications. Staff included in its proposed EEL tariff language indicating that a "telecommunications carrier may only request the EEL for the provision of interexchange access service when the carrier can certify, and does so in writing, that the telecommunications carrier uses that EEL arrangement to provide a significant amount of local exchange traffic to its end user customer pursuant to the criteria set forth" in the FCC's Supplemental Order Clarification. (Staff Ex. 2.0, p. 15). While Ameritech Illinois fully agrees with the inclusion of tariff language incorporating the FCC's local usage restriction, Staff's proposed tariff language unduly restricts the applicability of the local use restrictions in a manner which does not comply with the Supplemental Order Clarification. Accordingly, to the extent that the Proposed Order adopts Staff's, rather than Ameritech Illinois', proposed language on this issue, the Company takes exception.

Staff's tariff language provides that the local usage restrictions apply only to EELs used for the provision of "interexchange access service," where the "interexchange access service" is defined by Staff to mean "service provided over facilities that extend between an end user's premises and an interexchange carrier's point-of-presence that are used to originate or terminate interstate toll traffic, and does not include advanced service or information access service (e.g., interstate special access xDSL service)." Staff's tariff language further states that "no restrictions apply to the use of EEL arrangements that are not used to provide interexchange access service as defined in this paragraph."

There are two problems with Staff's proposed language. First, as discussed above in the Section of this Brief on Exceptions addressing the Proposed Order's conclusion regarding

"point-to-point data circuits," the local use restrictions adopted in the Supplemental Order Clarification apply generally to requests for loop-dedicated transport combinations used in the "exchange access market" of which the "special access market" is a "subset." Supplemental Order Clarification, ¶¶ 3, 10, 13 et seq. Under the 1996 Act, the term "exchange access" is defined broadly to include "the offering of access to telephone exchange services or facilities for the purpose of origination or termination of telephone toll services," where "toll service means 'telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service'." 47 U.S.C. § 153 (16). Reading these two definitions together, "exchange access services" includes any services provided between exchange areas. By using the term "interexchange access service," and defining it narrowly to include only that service "provided over facilities that extend between an end user premises and an interexchange carrier's point-of-presence that are used to originate or terminate interstate toll traffic," Staff's proposed tariff language would unduly limit the applicability of the FCC's local use restrictions, in contravention of the Supplemental Order Clarification.

The apparent intent of Staff's proposed language is to exclude from the application of the local use restrictions so-called "private line," or "point-to-point data" circuits. For the reasons previously discussed, however, special access circuits and private line circuits are both subject to the Supplemental Order Clarification's local usage test if such circuits are used on any basis other than a purely local one. Moreover, the scope of the Supplemental Order Clarification is not

limited to special access arrangements used to terminate interstate toll traffic, but rather applies to intrastate special access circuits as well.[24]

Second, Staff's proposed tariff language is objectionable because it provides that the FCC's criteria requiring a "significant amount of local exchange service" should not apply to "advanced services or information services (e.g., interstate special access xDSL service)." (Staff Ex. 2.0, p. 15). The FCC expressly rejected that very position in the Supplemental Order Clarification, stating that "[w]ith regard to data services, we note that the local usage options we adopt do not preclude a requesting carrier from providing data over circuits that it seeks to convert, *as long as it meets the thresholds contained in the options*." Supplemental Order Clarification ¶ 27 n. 76 (emphasis added). Moreover Staff's proposed limitation on the applicability of the FCC's local use restrictions, which rest on the CLEC's provision of local voice traffic (Supplemental Order Clarification, ¶ 22), was unsupported by any testimony and should be rejected. Most xDSL traffic is internet bound. (Am. Ill. Ex. 2.1, p. 36). The FCC has determined that internet bound traffic is interstate traffic. Such data traffic cannot be construed to be "local" or "voice" in nature; nor should it be exempted from the condition in the Supplemental Order Clarification that UNE transport combinations be used in accordance with the local exchange service criteria required by the FCC's Supplemental Order Clarification. (Am. Ill. Ex. 2.1, pp. 36-37).

For all the reasons discussed, Staff's proposed language addressing the FCC's local use restrictions should be rejected as being inconsistent with the Supplemental Order Clarification. Because the Joint CLECs' proposed tariff language is based on Staff's, that language suffers

[24] Ameritech Illinois notes that the Staff's proposed definition of "interexchange access service" was not included in the version of the EEL tariff sponsored by Staff witness Zolnierek in his direct testimony. Rather, it was introduced by Staff for the first time in the proposed EEL tariff attached to its Initial Brief.

from the same defects and should be also rejected. The Proposed Order should be modified to expressly approve the Company's proposed tariff for the reconfiguration of qualifying special access and private line services to UNE loop transport combinations (Ill. CC No. 20, Part 19, Section 19), as revised and attached to the Company's Reply Brief. The Commission should also approve the Company's proposed EELs tariff (Ill. CC No. 20, Part 19, Section 20) which addresses the terms under which the Company will provide new loop-dedicated transport combinations. Both of these proposed tariffs reflect an application of the FCC's local use restrictions which is consistent with the language and intent of the Supplemental Order Clarification.

IX. THE COMPANY'S ULS-ST TARIFF COMPLIES WITH ALL REQUIREMENTS OF SECTION 13-801

The ULS-ST section of the Proposed Order makes three erroneous holdings:

1) that the UNE Platform can be resold by CLECs to other carriers;

2) that 13-801(d)(4) allows a CLEC to avoid paying Ameritech Illinois' switched access rates for local switching used to terminate toll calls carried by the CLEC; and

3) that the FCC's "switch carve out" rule does not apply in Illinois.

Each issue is incorrectly decided in the Proposed Order and is based on an improper statutory construction of the terms of Section 13-801. Moreover, the findings in the Proposed Order, if adopted, would be preempted by federal law and must therefore be rejected.

A. SECTION 13-801(d)(4) CANNOT BE CONSTRUED TO PERMIT A CLEC TO RESELL THE "NETWORK ELEMENTS PLATFORM" TO OTHER CARRIERS

The Proposed Order would permit a CLEC to resell the "network elements platform" to other carriers. (Prop. Order, p. 138-39). This is contrary to clear requirements of Section 13-801(d)(4) and must be rejected.

Section 13-801(d)(4) states that a telecommunications carrier may "use a network elements platform…to provide end to end telecommunications service…to its end users or pay telephone service providers". The clear requirement of the term "to its end users" (or pay telephone service providers) means that the telecommunications carrier purchasing the platform can use it only to provide services to its end users (or pay telephone service providers). The Proposed Order ignores this plain language and uses strained reasoning to conclude that a CLEC may resell the platform to other carriers so long as the ultimate purchaser in the chain uses the platform to provide service to an end user or pay telephone service provider. This interpretation stands the clear meaning of the statute on its head. It reads the term "to its end users" completely out of the statute and would allow the Joint CLECs to accomplish in this proceeding what they were unable to do in the Illinois General Assembly – i.e., remove the clear resale restriction embodied in the law.

The reasoning in the Proposed Order is as follows:

> The issue before the Commission is whether the statute may be read as limiting to Ameritech Illinois the opportunity to sell the portion of a platform utilized to provide interexchange service. No such limitation appears on the face of the statute. It speaks solely to a telecommunication carrier's use of a network element platform to provide interexchange services, not the entity from whom a platform must be purchased.

(Prop. Order, p. 139). The Proposed Order reasons that resale is permissible because nothing in 13-801(d)(4) prevents a carrier from purchasing an Ameritech Illinois platform from a carrier

other than Ameritech Illinois. The Proposed Order ignores the obvious fact that this would never be possible unless the CLEC which purchases the platform from Ameritech Illinois in the first instance is reselling the platform in violation of the "end user" limitation. In other words, the CLEC purchasing the platform from Ameritech Illinois, by necessity, violates the "end user" limitation when it resells to another carrier rather than to its (i.e., the purchasing CLEC's) "end user" (or pay telephone service provider). By ignoring the obligations that apply to the CLEC that initially purchases the UNE Platform from Ameritech Illinois, the Proposed Order reaches an erroneous conclusion.

A hypothetical will illustrate the problem. Suppose a taxicab driver purchases an automobile and obtains a discount from the dealer based upon the representation that the taxicab driver will use the automobile to provide taxi services to his end users. Instead of using the automobile as a taxicab, however, the taxicab driver sells it to a second taxicab driver. The first taxicab driver has clearly violated the requirement that he use the automobile to provide services to his end users, and it makes little difference to observe that no legal obligation prevented the second taxicab driver from buying the automobile. Nothing involving the second taxicab driver can obscure the fact that the first taxicab driver has not complied with his obligation.

The Proposed Order relies upon faulty logic by ignoring the clear requirement that applies to the CLEC purchasing the platform from Ameritech Illinois. The Proposed Order must be modified to restore the requirement that the UNE Platform be used by the purchasing CLEC only to provide services to its end users (or pay telephone service providers).

B. 13-801(D)(4) CANNOT BE CONSTRUED TO ELIMINATE SWITCHED ACCESS RATES WHEN LOCAL SWITCHING IS USED TO TERMINATE AN INTRALATA TOLL CALL

The Proposed Order erroneously finds that CLECs using the network elements

platform to provide intraLATA toll do not have to pay Ameritech Illinois' switched access rates for local switching used to terminate the toll call. (Prop. Order, pp. 138-39). CLECs presumably would pay a lesser TELRIC-based reciprocal compensation rate for the local switching function they use. The distinction between switched access rates and reciprocal compensation rates is significant and must be maintained for at least five reasons:

1) Section 13-801(d)(4) limits the "network elements platform" to combinations of loop, switch and transport and therefore, by definition, cannot include the local switching functionality used to terminate an intraLATA toll call;

2) Under federal law local switching used to terminate toll traffic cannot be part of a "network elements platform";

3) Section 13-801(a) requires that the statute be applied consistent with federal requirements;

4) Section 13-801(j) requires that the local switching component of terminating switched access be undisturbed by Section 13-801; and

5) Section 13-801(a) requires the Commission to implement the "maximum development" of competition, which cannot be achieved under the discriminatory result mandated by the Proposed Order.

First, there is a well-established definition of the term "platform" under prevailing precedent of the FCC and this Commission. Ignoring that precedent, the Proposed Order concludes that in the absence of a definition of the term in Section 13-801, the Legislature must be presumed to have intended to reject the prevailing definition. (Prop. Order, p. 31). That conclusion is contrary to rules of statutory construction which require the Commission to interpret the term consistent with its well-established definition. Citizens Utility Company of

Illinois v. Illinois Pollution Control Board, 133 Ill. App. 3d 406, 478 N.E. 2d 853 (1985). Moreover, the Proposed Order's interpretation of the term "platform" is inconsistent with the way that term is used in 13-801(d)(6) and 13-801(j). All of these arguments are fully set forth in Section II.C of this Brief.

Second, under Federal law local switching cannot be an unbundled network element and cannot be part of the UNE Platform when it is used to terminate intraLATA toll calls. (Am. Ill. Initial Brief, pp. 64-68). This is so because the local switch port in question is used by Ameritech Illinois to provide dial tone to an Ameritech Illinois end user and therefore cannot be an unbundled network element as defined in FCC Rule 51.319(c). Under 51.319(c), local switching is a UNE only when it is used to provide *local* exchange service – hence the label "*local* circuit switching capability" in the rule. When, as here, the switch port is being used to terminate a toll call, it is not being used to provide local exchange service. Moreover, the FCC has made clear that a CLEC must use unbundled local switching "for a particular customer line". First Report and Order, ¶ 414. That "customer line" is for the CLEC's end user only, not for the Ameritech Illinois end user. The switch port and line for the Ameritech Illinois end user are used and controlled exclusively by the Ameritech Illinois to serve its end user; they are not in any way shared with any CLEC. Indeed, the FCC has specified that local switching involves "dedicated facilities" so a CLEC has no right to lease local switching ports that the ILEC is using to provide local exchange service to the ILEC's end user. Order on Reconsideration, CC Docket 96-98; FCC 96-394, at ¶ 12 (Released September 27, 1996).

In addition, no party undertook to establish that the local switch port in question was an unbundled network element under the "necessary and impair" standard mandated by federal law. The complete lack of evidence on this point demonstrates the error of the Proposed Order. As it

turns out, the switch port used to terminate a toll call could never satisfy the "necessary and impair" test under the UNE Remand Order and, therefore, could never be found to be a UNE. In particular, a CLEC could never establish under FCC Rule 51.317(b) that a "lack of access" impairs its ability to provide a service for the simple reason that CLECs have no right to use a switch port in any case where the CLEC is not providing local service to the customer served by that port.

Third, Section 13-801(a) requires that all of Section 13-801 be interpreted so that it is "not inconsistent with" and "not preempted by" federal law. The Proposed Order mistakenly finds that the "not inconsistent with" and the "not preempted by" language is not a legislative instruction as to how the statute should be construed, but is rather a legislative conclusion that nothing in Section 13-801 is, in fact, inconsistent with federal law. (Prop. Order, pp. 74, 139-40). This interpretation is clearly wrong. For example, under federal law it is clear that ILECs have no obligation to combine UNEs for CLECs. (IUB III). Under Section 13-801(d)(3) as interpreted by the Proposed Order, however, ILECs *do* have that obligation. (Prop. Order, pp. 56-57) Also, under federal law it is clear that the "necessary" and "impair" tests apply to UNEs. 47 U.S.C. § 251(d)(2); 47 C.F.R. 51.317(b). Under Section 13-801(d)(4), as interpreted by the Proposed Order, there is *no* "necessary" and "impair" requirement. (Prop. Order, pp. 29-33). Under federal law, CLECs may only collocate equipment that is "necessary" for interconnection or access to unbundled network elements. 47 U.S.C. § 251(c)(6). Under Section 13-801(c), as interpreted by the Proposed Order, there is no requirement under Illinois law that collocated

equipment be "necessary" for interconnection or access to UNEs. (Prop. Order, p.18).[25] Since Public Act 92-22 is clearly inconsistent with federal law on its face (at least with respect to new UNE combinations), there is no support for the Proposed Order's conclusions that 13-801(a) is a legislative conclusion that Public Act 92-22 is consistent with federal law.

The "not inconsistent with" and "not preempted by" language can only be interpreted as an instruction that this Commission, wherever possible, construe Section 13-801 consistently with federal law. The Proposed Order has clearly not done so on this issue and its holding must be rejected.

Fourth, the holding on local switching used to terminate a toll call runs afoul of Section 13-801(j). Section 13-801(j) provides that:

> Other than as provided in Subdivision (d)(4) of this section for the network elements platform described in that subdivision, nothing in this amendatory Act of the 92nd General Assembly is intended to require or prohibit the substitution of switched or special access services by or with a combination of network elements nor address the Illinois Commerce Commission's jurisdiction or authority in this area.

By its terms, Section 13-801(j) expressly states that nothing in Public Act 92-22 should be construed to require the substitution of a "combination of network elements" for switched access services. Thus, Section 13-801(j) preserves the status quo with the respect with switched access services and thereby preserves Ameritech Illinois' ability to charge switched access rates for its local switching functionality when it is used by CLECs to terminate intraLATA toll calls originated over the "network elements platform".

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[25] Moreover, it would make little sense to construe the "not inconsistent with" language as a judgment that Section 13-801 is consistent with federal law because federal law is a moving target. Indeed, the Legislature must have known at the time Public Act 92-22 was enacted that some of the most important unbundling and interconnection issues under federal law were being extensively litigated in federal court. See, e.g., Iowa Utilities Board v. FCC, 219 F.3d 744, 758-59 (8th Cir. 2000), cert. granted (Jan. 22, 2001).

Ameritech Illinois acknowledges that there is a specific exception in 13-801(j) stating that the prohibition on the substitution of a "combination network elements" for switched access does not prevent CLECs from using the "network elements platform" described in 13-801(d)(4) to provide intraLATA local, toll and access services. This exception does not apply to local switching used to terminate toll calls because that is not a part of the "network elements platform" described in (d)(4). As discussed in Section II.C of this Brief, the "network elements platform" consists of a combination of a loop, a switch port and transport. It does not include a switch port that provides dial tone to an Ameritech Illinois end user and that is "used" by a CLEC only when the CLEC's end user places a call to that Ameritech Illinois end user.

Ameritech Illinois does not quibble with the fact that Section 13-801(j) allows the substitution of the "network elements platform" for some switched access services. To be precise, the switched access elements within the scope of the (d)(4) exception to Section 13-801(j) are the interoffice transport and tandem switching access charges that are displaced when a CLEC uses the "network elements platform" to provide intraLATA toll. This is because those are the only switched access components needed by a CLEC to provide the "intraLATA toll" service authorized by 13-801(d)(4). In addition, unlike the local switch port that serves the Ameritech Illinois end user, these are not dedicated to a particular Ameritech Illinois end user.

The decision in the Proposed Order is based, in part, on the finding that the purpose of Section 13-801(d)(4) is to provide CLECs with "the ability to provide interLATA toll". (Prop. Order, p. 138). This objective is achieved by including intraLATA transport (and, if applicable tandem switching) as part of the Section 13-801(d)(4) "network elements platform". It does not require a finding that the local switch port used to terminate a toll call is part of the "network elements platform".

Fifth, the Commission is required to construe Section 13-801 in a manner that will encourage the development of competition "to the fullest extent possible". 220 ILCS § 5/13-801(a). This necessarily includes a consideration of how the statute impacts competition between CLECs. Contrary to this directive, the Proposed Order would establish a regime which unreasonably discriminates against facility-based CLECs and IXCs in favor of CLECs that use the "network elements platform" to provide intraLATA toll in Illinois. Facility-based CLECs and IXCs would continue to pay Ameritech Illinois' tariffed switched access rates for the local switch used to terminate intraLATA toll calls. Their UNE-P competitors, on the other hand, would pay Ameritech Illinois the lower reciprocal compensation rate for the same functionality. It is the express intent of Section 13-801(a) that such disparate impact be avoided.[26]

C. THE FCC'S "SWITCH CARVE OUT" RULE APPLIES IN ILLINOIS

The Proposed Order concludes that the FCC's limitation on an ILEC's obligation to offer unbundled local switching does not apply in Illinois. (Prop. Order, pp. 139-40). According to the Proposed Order, federal law is irrelevant to its interpretation and application of Section 13-801. For the reasons discussed earlier in this Section, this conclusion is wrong and must be rejected. Specifically, Section 13-801(a) requires this Commission to interpret the law in a manner "not inconsistent with" and "not preempted by" federal law. Under federal law, states must apply the "necessary and impair" test to identify unbundled network elements and must abide by the FCC's decisions when the FCC has already applied the "necessary and impair" test – as it has with respect to unbundled local switching.

[26] Even if the Commission adopts the Proposed Order in its current form (which it should not) then it must at the very least make clear that reciprocal compensation rates apply for local switching. Reciprocal compensation rates are cost-based rates as required by Section 13-801(g). These are Commission approved rates which apply to the termination of calls and there is no need to look elsewhere for applicable cost-based rates.

The FCC's UNE Remand Order specifically holds that an ILEC need not provide unbundled local switching to serve customers with four or more lines in certain areas in the top fifty MSAs where the ILEC has also provided access to the enhanced extended link ("EEL").[27] Thus, the FCC's rules permit Ameritech Illinois to stop offering unbundled local switching in certain circumstances, so long as Ameritech Illinois has made the EEL available in that area. This "switch carve out," as the FCC describes it,[28] is part and parcel of the definition of unbundled local switching and is a product of the FCC's binding application of the "necessary and impair" analysis. This is discussed in more detail in the next section.[29]

[27] UNE Remand Order, para. 278. 47 C.F.R. Section 51.319(c)(2) provides: "Notwithstanding the incumbent LEC's general duty to unbundle local circuit switching, an incumbent LEC shall not be required to unbundle local circuit switching for requesting telecommunications carriers when the requesting telecommunications carrier serves end-users with four or more voice grade (DS0) equivalents or lines, provided that the incumbent LEC provides nondiscriminatory access to combinations of unbundled loops and transport (also known as the "Enhanced Extended Link") throughout Density Zone 1, and the incumbent LEC's local circuit switches are located in:

(i) The top 50 Metropolitan Statistical Areas as set forth in Appendix B of the Third Report and Order and Fourth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, and

(ii) In Density Zone 1, as defined in § 69.123 of this chapter on January 1, 1999.

[28] UNE NPRM, paras. 55-56.

[29] Ameritech Illinois acknowledges that this Commission's order approving the SBC/Ameritech Merger limits Ameritech Illinois' ability to take advantage of the FCC's "switch carve out". (Am. Ill. Init. Brief, pp. 76-79).

D. FEDERAL LAW WOULD PREEMPT THE PROPOSED ORDER'S HOLDINGS ON THE ULS-ST ISSUES

The three ULS-ST holdings, if adopted, would be preempted by federal law and must be changed by the Commission if they are ultimately to survive constitutional scrutiny[30]. The holdings on the "local switch terminating toll" issue and the "switch carve out" issue would be expressly preempted because they ignore the FCC's mandate in FCC Rule 51.317(b)(4) to follow the "necessary and impair" test. These holdings are based on the conclusion that Section 13-801(d)(4) eliminates the "necessary and impair" test. (Prop. Order, pp. 138-39). In each case, the Proposed Order finds that the language of 13-801(d)(4) places no limitations on the definition of "network element" and refuses to consider limitations that exist in federal law. Ameritech Illinois continues to urge the Commission to follow 13-801(a) by applying Public Law 92-22 in a

[30] Federal law not only preempts state law that conflicts with federal substantive standards, but it also trumps state action that "interferes with the methods by which the federal statute was designed to reach [its] goals." *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 103 (1992). PA 92-22 appears to completely circumvent the specific procedure put in place by Congress for implementing access and interconnection obligations, as well as the Act's requirement that the federal courts – and only the federal courts – determine the lawfulness of the access and interconnection obligations imposed by state commissions. 47 U.S.C. Section 252(e)(6). Under the federal Act, access and interconnection obligations are implemented in interconnection agreements; where the parties are unable to agree, state commissions resolve open issues by imposing requirements consistent with those imposed by the Act; and any party aggrieved in that process may obtain review *exclusively* in federal court.

PA 92-22 dispenses with interconnection agreements altogether. Instead, it replaces the federal procedural edifice with a self-executing set of obligations, state commission complaint proceedings (under Sections 514-516), and exclusive *state* court review of both the lawfulness of access and interconnection obligations imposed by the statute and the ICC and the remedies imposed by the ICC. In short, the Illinois statute transforms the ICC from a deputized federal regulator administering a federal regulatory scheme into a state regulatory agency enforcing a state statute, and obviates Congress' carefully crafted scheme of exclusive federal court review. As such, the procedural apparatus put in place by PA 92-22 to deal with interconnection issues would appear to conflict directly with the federal Act and therefore be preempted.

Any challenge to Section 13-801 would also inevitably call into question whether the statute violates the Equal Protection clause of the United States Constitution. To the extent that Section 13-801 imposes obligations beyond those currently established by federal law, those sections apply only to Ameritech Illinois (as the only carrier subject to alternative regulation in Illinois); they do not apply to rate of return carriers. The General Assembly did not articulate in the statute or in any legislative history any basis for that distinction, and no such rationale exists. The complete absence of even a conceivable rationale for the classification made by the legislature violates even the most generous, pro-regulation application of the rational relationship test. See, *e.g.*, Romer v. Evans, 517 U.S. 620, 632 (1996) ("even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained").

manner "not inconsistent with" and "not preempted by" federal law. At a minimum, this means that the Commission must recognize that the "necessary and impair" test applies to all network elements. This, in turn, will mean that CLECs are not entitled to purchase local switching to terminate toll traffic as a network element and that the FCC's "switch carve out" rule set forth in the UNE Remand Order applies in Illinois[31].

Federal law establishing the "necessary and impair" test is as follows. Section 251(d)(2) of the Act provides that "[i]n determining what network elements should be made available for purposes of" Section 251(c)(3), "the Commission shall consider, at a minimum, whether – (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." Despite these express limitations, the FCC initially promulgated rules that had the effect of requiring incumbents to unbundle all network elements, limited only by the requirement that such unbundling be technically feasible. In AT&T Corp. v. Iowa Utils Bd., 525 U.S. 366, 390 (1999) ("IUB II"), the Supreme Court vacated the FCC's unbundling rules, explaining that "if Congress had wanted to give blanket access to incumbents' networks * * * it would not have included section 251(d)(2) in the statute at all. It would simply have said * * * that whatever requested element can be provided must be provided." Id. The Court went on to hold that the mere fact that something is technically feasible does not mean that an ILEC must provide it to CLECs under the Act. Rather, under the Act, an ILEC is only required to provide network elements that have been

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[31] Ameritech Illinois is asked to obey rules of the FCC and the ICC, but Ameritech Illinois cannot rationally follow two conflicting or inconsistent rules that apply to the exact same facilities. Ameritech Illinois does not have separate loops and switches that are used to provide *intrastate* UNEs on the one hand and *interstate* UNEs on the other hand. It is a single network and one set of rules must give way to the other. Under the Supremacy Clause of the United States Constitution it is unquestionably the state rules that must give way to the federal rules.

ordered to be unbundled, and no such order could be issued until there was a determination that unbundling a specific network element meets the "necessary and impair" test of the section 251(d)(2) of the Act. In response to the IUB II decision, the FCC issued its UNE Remand Order and promulgated a new "necessary and impair" standard – purportedly with the teeth required by the Supreme Court. This new standard was incorporated in FCC Rule 317 – which governs unbundling of additional network elements by state commissions. Rule 317 commands state commissions to apply the FCC's new "necessary and impair" test before ordering any new unbundling requirement and prohibits them from imposing such a requirement unless the additional unbundling at issue passes that test. The state is given no wiggle room. Rule 317 expressly mandates that "[a] state commission *must comply* with the standards set forth in this § 51.317 when considering whether to require the unbundling of additional network elements" (emphasis added). Thus, the Act itself establishes a mandatory "necessary and impair" test for network element requests and the FCC's regulations *expressly require the states* to apply that test before ordering the unbundling of any network elements.

The FCC Rule is dispositive here because federal preemption applies not only where state law conflicts with a federal statute, but also where state law conflicts with federal regulations. Geier v. American Honda Motor Co., 529 U.S. 861, 884 (2000); Fidelity Federal Savings and Loan Assoc. v. De la Cuesta, 458 U.S. 141, 153-54 (1982). The Supreme Court has explained that federal regulations represent the actions of an administrator empowered by Congress to act on its behalf. De la Cuesta, 458 U.S. at 153. For that reason, FCC Rule 317 has "no less preemptive effect" than a direct mandate by Congress in the 1996 Act. Id.

Accordingly, under the Act, FCC Rule 317, and the Supreme Court's ruling in IUB II, a state commission may require an ILEC to unbundle a network element (not already required to

be unbundled under FCC Rule 319) only after conducting a thorough, "fact-intensive" investigation to determine whether the proposed UNE satisfies the "necessary and impair" tests of Section 251(d)(2) of the Act and FCC Rule 317. The Proposed Order fails to recognize that network elements used for intrastate services (and thus subject to the jurisdiction of the Commission) are nonetheless subject to the "necessary and impair" test. As a consequence, it also fails to consider how the" necessary and impair" test bears on the "local switch terminating toll" issue and "switch carve out" issue. Both defects are fatal and require the Commission to reject the holdings on these issues.[32]

The remaining issue is whether a CLEC may resell Ameritech Illinois' network elements platform under Section 13-801(d)(4) without running afoul of federal preemption concerns. The answer is that it may not. The resale permitted by the Proposed Order, while not expressly preempted, is nonetheless substantively preempted by federal law.

The Supreme Court repeatedly has observed that "[p]re-emption may be either expressed or implied, and 'is compelled whether Congress's command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 98 (1992). Implied preemption occurs when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress — whether that 'obstacle' goes by the name of 'conflicting; contrary to; * * * repugnance; difference; irreconcilability; inconsistency; violation; curtailment; * * * interference,' or the like." Geier v. American Honda Motor Co., 529 U.S. 861, 873 (2000). Any

[32] The FCC has already specifically applied the "necessary and impair" test to local switching and the "switch carve out" rule is the result. The Commission could not reach a different result. In other words, this Commission is not free to apply the "necessary and impair" test inconsistently with the way it is applied by the FCC. Under Section 261(c) of the Act and FCC Rule 51.317(b), states can create additional UNEs using the "necessary and impair" test but they cannot reverse FCC findings that have already established the proper scope of the unbundling obligation of a particular network element.

"conflicts [between state and federal law] that prevent or frustrate the accomplishment of a federal objective . . . are 'nullified' by the Supremacy Clause." Id.

As the Supreme Court has stressed in a long line of preemption decisions, where Congress or congressionally-designated federal agencies have made a specific "policy judgment" as to how "the law's congressionally mandated objectives" would "best be promoted," the states are not at liberty to deviate from those "deliberately imposed" federal prerogatives. Geier, 529 U.S. at 872, 881. In other words, where federal law sets forth a legal and regulatory framework for accomplishing a lawful objective through the balancing of competing interests, the states may neither add to nor subtract from the degree of regulation that federal law prescribes. Nor can the states depart from a federal decision to adopt a policy of flexibility that reflects Congress' judgment as to the proper balance of competing regulatory concerns. See, e.g., Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 155 (1982) (a federal regulation that "consciously has chosen not to mandate" particular action preempts state law that would deprive an industry "of the 'flexibility' given it by [federal law]").

The Proposed Order finds that CLECs may resell Ameritech Illinois' platform to other carriers. FCC precedent holds that such resale of unbundled network elements in general, and shared transport and local switching in particular, is not allowed under federal law. In the FCC's Order on Reconsideration in CC Docket No. 96-98, FCC 96-394 (released September 27, 1996), paras 10-13, the FCC held that a carrier could not purchase unbundled local switching to provide access services unless that carrier also provides local exchange service to the end user. Similarly, in the Third Order on Reconsideration in CC Docket 96-98, FCC 97-295 (released August 18, 1997), paras 38-39, the FCC held that a carrier could not purchase unbundled shared transport to provide access services unless that carrier also provides local exchange service to the

end user. Thus, the FCC has already ruled that under the pervasive federal regulatory law applicable to unbundled network elements, carriers may not resell the local switching and shared transport UNEs as access services. Carriers must use UNEs to provide services to end users, and only then may they collect from other carriers the access charges that flow from the provision of local exchange service. In light of the clear federal precedent on this issue, the state of Illinois may not establish a different rule. To this extent, the Proposed Order's finding, if adopted, would be preempted by federal law. Ameritech Illinois urges the Commission to avoid this preemption issue by interpreting Section 13-801 in a manner consistent with federal law – as it is bound to do under the "not inconsistent with" and "not preempted by" language of Section 13-801(a) – and rejecting the resale requirement in the Proposed Order.

X. THE PROPOSED ORDER IMPROPERLY HOLDS THAT CLECS BEAR NO FINANCIAL RESPONSIBILITY FOR THE EXTRA TRANSPORT COSTS THAT ILECS INCUR WHEN THE CLEC CHOOSES A "SPOI" ARCHITECTURE

It is undisputed that CLECs may interconnect with Ameritech Illinois' network at a single point of interconnection ("SPOI"). 220 ILCS 5/13-801(b)(1)(B). The issue is whether, when a CLEC exercises its right to establish a SPOI architecture, it can do so without bearing any of the costs for the additional transport it imposes on Ameritech Illinois. Stated another way, when Ameritech Illinois and a CLEC interconnect at a single point in a LATA, can the CLEC require Ameritech Illinois to transport traffic long distances across the LATA without compensation? The Proposed Order erroneously concludes that it can.

The Proposed Order's conclusion on the single point of interconnection issue is wrong for at least three reasons:

1) It relies on an incorrect reading of federal law and FCC Rule 51.703(b) which, contrary to the Proposed Order, does not prohibit Ameritech Illinois from charging CLECs to transport calls to a distant POI;

2) It is inconsistent with this Commission's holding in the Level 3 Arbitration; and

3) It is inconsistent with this Commission's past rulings which allocate Ameritech Illinois' costs to entities that cause the costs.

Ameritech Illinois respectfully requests that the Commission allow Ameritech Illinois to charge a CLEC for the additional transport it uses when it deploys a SPOI architecture. This section of the brief will demonstrate why the Proposed Order is wrong as a matter of law and policy and will explain why Ameritech Illinois' position should be adopted.

A. PERTINENT FEDERAL PRECEDENTS SUPPORT THE PROPOSITION THAT A CLEC SHOULD BEAR THE INCREMENTAL COSTS CAUSED BY ITS DECISION TO INTERCONNECT AT A SINGLE POINT PER LATA.

The Proposed Order misapplies federal law by erroneously concluding that adoption of Ameritech Illinois' position "would clearly contravene a current proscription of Federal Law". (Prop. Order, p. 105). In fact, federal law *supports* Ameritech Illinois' position. In a nutshell, and as demonstrated below, the pertinent federal law is this:

?? Neither the FCC nor this Commission has specifically ruled on how the costs caused by a CLEC's election to use a single POI *must* be allocated.

?? The FCC has, however, ruled that it is *permissible* to require the CLEC to bear those costs, and that such a requirement is not inconsistent with the CLEC's right to choose a single point of interconnection.

?? Although presented with at least two opportunities to do so, the FCC has never ruled that FCC Rule 51.703(b) prevents an ILEC from recovering its increased transport costs in a SPOI architecture from a CLEC.

?? The FCC has also made clear that a CLEC that wishes an expensive interconnection must bear the cost of that interconnection, and a single point of interconnection is an "expensive interconnection."

?? The one federal court of appeals that has touched on the subject contemplates that a CLEC that chooses a single point of interconnection will bear the resulting costs.

1. The FCC's Treatment Of Interconnection In The *Local Competition Order* Suggests That A CLEC Should Bear The Incremental Costs Caused By Its Election Of A Single Point Of Interconnection.

This Commission has never directly decided which carrier should bear the incremental costs caused by a CLEC's decision to establish a single POI. As we explain in subsection 2 below, the FCC has ruled that a requirement that the CLEC bear the costs is permissible, but has not definitively ruled that the CLEC must bear the costs. The principles of interconnection that the FCC set forth in the First Report and Order in CC Docket No. 96-98, FCC 96-325 (Released August 8, 1996) ("Local Competition Order"), however, strongly support the view that the CLEC should bear the costs.

Section 252(c)(2) of the 1996 Act imposes a duty on Ameritech Illinois to provide interconnection with its network for the transmission and routing of telephone exchange service and exchange access on terms and conditions that are just, reasonable and non-discriminatory. As the FCC found in the Local Competition Order, section 252(c)(2) permits the CLEC to select the points in the ILEC's network at which it will deliver traffic. Recognizing, however, that "competing carriers must usually compensate incumbent LECs for the additional costs incurred by providing interconnection," the FCC noted (Id. ¶ 209) that "competitors have an incentive to make economically efficient decisions about where to interconnect." In this regard, the FCC reasoned that a "requesting carrier that wishes a 'technically feasible' but expensive

interconnection would, pursuant to section 252(d)(1), be required to bear the cost of that interconnection, including a reasonable profit." (Id. ¶ 199).

A single point of interconnection is "expensive interconnection" as the FCC used that term in paragraph 199. As Mr. Mindell testified (Am. Ill. Ex. 6.0, pp. 9-10), if a CLEC elects a single POI, it causes calls that otherwise would be transported within a single local calling area to be transported an additional distance across several local calling areas. Thus, the form of interconnection elected by a CLEC is "expensive" as the FCC used that word in paragraph 199 of the Local Competition Order and, as the FCC there stated, a CLEC "would . . . be required to bear the cost of that interconnection, including a reasonable profit."

2. The FCC Has Ruled That A CLEC's Right To Elect A Single POI Does Not Imply That The ILEC Should Bear The Additional Costs Caused By The CLEC's Election.

The principal argument that has been presented in support of Staff and Focal proceeds as follows: (1) a CLEC has the right to elect a single POI; (2) to require a CLEC to bear the additional costs that result from its choice of a single POI would burden the CLEC's exercise of that right; and, therefore, (3) a CLEC should not be required to bear those costs. As a matter of logic, the argument fails, just like an argument that a person's constitutionally protected right to eat in a restaurant whose owners would like to exclude him implies that the person should be allowed to eat there for free. More important, however, the FCC has, as a matter of controlling federal law, foreclosed that argument. That is, the FCC – while it has not specifically ruled that a CLEC *must* bear the additional costs that result from its choice of a single point of interconnection – has ruled that a CLEC cannot be spared from bearing those costs on the ground that the CLEC has a right to elect a single point of interconnection.

In Verizon's Pennsylvania 271 proceeding, CLECs argued that Verizon was violating its obligation to allow a single POI by requiring CLECs to pay for transport in exactly the situation that is at issue here. The FCC rejected the CLECs' argument, and distinguished between Verizon's duty to allow a single POI and a duty – hypothesized by the CLECs – to allow a single POI for free[33]:

> Although several commenters assert that Verizon does not permit interconnection at a single point per LATA, we conclude that Verizon's policies do not represent a violation of our existing rules. Verizon states that it does not restrict the ability of competitors to choose a single point of interconnection per LATA because it permits carriers to physically interconnect at a single point of interconnection (POI). Verizon acknowledges that its policies distinguish between the physical POI and the point at which Verizon and an interconnecting competitive LEC are responsible for the cost of interconnection facilities. The issue of allocation of financial responsibility for interconnection facilities is an open issue in our Intercarrier Compensation NPRM. We find, therefore, that Verizon complies with the clear requirement of our rules, i.e., that incumbent LECs provide for a single physical point of interconnection per LATA. Because the issue is open in our Intercarrier Compensation NPRM, we cannot find that Verizon's policies in regard to the financial responsibility for interconnection facilities fail to comply with its obligations under the Act.

Similarly, in SWBT's Kansas/Oklahoma 271 proceeding, CLECs argued that SWBT was violating its SPOI obligation by requiring CLECs to pay for transport[34]. Once again, the FCC rejected the CLEC arguments and refused to invalidate the SWBT SPOI offer.

By themselves, these FCC decisions

?? instruct that for this Commission to resolve the SPOI issue in Ameritech Illinois' favor would be consistent with the 1996 Act and the FCC's implementing regulations; and

[33] FCC, Memorandum Opinion and Order, In the Matter of Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania, CC Docket No. 01-0138, rel. Sept. 19, 2001 at ¶ 100 ("Verizon 271 Order").

[34] In re Joint Application by SBC Communications, Inc. et al for Provision of In-Region, interLATA Services in Kansas and Oklahoma, CC Docket No. 00-217, Memorandum Opinion and Order, FCC 01-29 (Released Jan 22, 2001) ("Kansas/Oklahoma 271 Order").

?? *preclude* the argument that to resolve the SPOI in Ameritech Illinois' favor would be inconsistent with a CLEC's right to elect a single point of interconnection.

To be sure, the FCC's decisions do not compel the conclusion that the SPOI *must* be resolved in Ameritech Illinois' favor. As we demonstrate below in Section X.B, however, Section 251(c)(2)(D) of the 1996 Act and Section 13-801(b)(1) of the PUA do.

3. FCC Rule 703(b) Does Not Prevent The Cost Recovery Ameritech Illinois Seeks

The Proposed Order rejects Ameritech Illinois' proposal because it would "contravene" FCC Rule 703(b). Rule 703(b) is irrelevant, however, because it has only to do with reciprocal compensation, not with anything that Ameritech Illinois is proposing here.

Rule 703(b) appears in Subpart H of the FCC's rules, which is entitled, "Reciprocal Compensation for Transport and Termination of Telecommunications Traffic." Subpart H begins with Rule 701(a), which provides, "The provisions of this subpart apply to reciprocal compensation for transport and termination of telecommunications between LECs and other telecommunications carriers." Thus, when Rule 703(b) provides that a LEC "may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network," it necessarily means that a LEC may not assess reciprocal compensation charges on any other carrier for such traffic.

What, then, is "reciprocal compensation"? It is, pursuant to Rule 701(a), compensation for "transport and termination of telecommunications traffic." And the "transport" that is comprised by reciprocal compensation is "the transmission and any necessary tandem switching of telecommunications traffic . . . *from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party* . . . ." (Emphasis

added.) The transport that is the subject of this proceeding is not from the POI to the terminating carrier's end office switch; rather, it is transport from the originating carrier's switch to the point of interconnection. Thus, it is not within the scope of reciprocal compensation at all, is not the subject of Subpart H of the FCC's rules, and is unaffected by Rule 703(b) in particular.

This analysis is confirmed by the discussion of Rule 703(b) that appears in the *Local Competition Order*, as part of which the FCC promulgated the rule:

> We conclude that, pursuant to section 251(b)(5), a LEC may not charge a CMRS provider or other carrier *for terminating LEC-originated traffic*. . . . As of the effective date of this order, a LEC must cease charging a CMRS provider or other carrier *for terminating LEC-originated traffic* and must provide that traffic to the CMRS provider or other carrier without charge. (Emphasis added.)[35]

Ameritech Illinois is not proposing to charge CLECs for terminating Ameritech-originated traffic. Rather, it is proposing that CLECs bear the incremental transport costs caused by CLEC's decision to employ a single POI architecture.

The FCC itself has made clear that what Ameritech Illinois is proposing does not run afoul of Rule 703(b), again, in the Verizon 271 Order. There, the FCC concluded that Verizon was not in violation of any FCC rule by virtue of its imposition of charges exactly like those that Ameritech Illinois proposes here. If the Proposed Order were correct in its assertion that Ameritech's proposal runs afoul of FCC Rule 703(b), the FCC could not possibly have reached that conclusion.

Furthermore, numerous FCC decisions on interconnection providers support Ameritech Illinois' right to seek compensation for the cost of services or facilities provided to other carriers that *are necessitated not by interconnection itself, but by those carriers' decision how to interconnect.* These decisions include TSR Wireless v. U.S. West ("wide area calling" and

[35] Local Competition Order ¶ 1042.

similar services),[36] Texcom, Inc. v. Bell Atlantic (cost of interconnection facilities used to carry third party originated traffic),[37] Metrocall v. Concord Telephone (cost of DID facilities that are used to transport third party-originated traffic),[38] and most recently Mountain Communications v. Qwest (cost of facilities used to carry "wide area calling" traffic).[39]

In summary, FCC Rule 703(b) does not preclude Ameritech Illinois from charging CLECs for the additional transport it must provide to CLECs when they select a single POI architecture. The Proposed Order's holding on this point is erroneous and should be modified as described in the Exceptions.

4. A Recent Third Circuit Decision Supports Ameritech's Position.

MCI Telecomm. Corp. v. Bell-Atlantic Pennsylvania, 271 F.3d 491 (3d Cir. 2001), was an appeal from a federal district court's decision on challenges to an arbitration decision by the Pennsylvania Public Utility Commission. In the arbitration, the ILEC contended that the CLEC should be required to interconnect in each access serving area, even when there was more than one such area within a LATA, and the CLEC contended it could be required to interconnect at only a single point per LATA. The PUC resolved the issue in favor of the ILEC (271 F.3d at 517), and the district court reversed. On appeal, the United States Court of Appeals for the Third Circuit affirmed the district court, concluding, as Ameritech Illinois concedes here, that the CLEC was entitled to insist on a single point of interconnection. (Id. at 518.) Having so concluded, though, the Court went on to say, "To the extent, however, that [the CLEC's]

[36] TSR Wireless v. US West, Docket Nos. E-98-13, *et al.*, 15 FCC Rcd. 11,166, FCC No. 00-194 (Released June 21, 2000), para. 40.
[37] Texcom, Inc., d/b/a Answer Indiana v. Bell Atlantic Corp., d/b/a Verizon Communications, Docket No. EB-00-MD-14, 16 FCC Rcd. 21,493, FCC No. 01-347 (Released Nov. 28, 2001), para. 8.
[38] Metrocall, Inc. v. Concord Tel. Co., Docket No. EB-01-MD-008, 2002 WL 192416 (F.C.C.), FCC No. DA 02-301 (Released Feb. 8, 2002), para. 12.
[39] Mountain Communications, Inc. v. Qwest Communications International, Inc., Docket No. EB-00-MD-017, Memorandum Opinion and Order, FCC No. DA 02-250 (Released Feb. 4, 2002).

decision on interconnection points may prove more expensive to [the ILEC], the PUC should consider shifting costs to [the CLEC]." (Id.)

The Third Circuit did not go so far as to hold that the PUC *must* shift costs to the CLEC – the case as it was presented did not call for the Court to take that step (in part because there had apparently been no showing, as there has been here, that the CLEC's decision would in fact cause incremental costs). Equally clearly, however, the Third Circuit's opinion supports the view that a CLEC that chooses a single POI architecture should bear such incremental costs as its decision causes. And the opinion corroborates the FCC's ruling in the Verizon 271 Order that the CLEC's right to a single POI does not imply that the CLEC should not pay the costs caused by its exercise of that right.

5. A Recent Decision of the North Carolina Utilities Commission Resolves This Issue in Ameritech Illinois' Favor

The SPOI issue was carefully considered by the North Carolina Utilities Commission in the AT&T/BellSouth Arbitration[40]. As in this case, all parties conceded that AT&T was entitled to interconnect at a single point within the LATA. As in this case, the issue was whether BellSouth could ask AT&T to pay for the additional transport cost incurred by virtue of the single POI architecture elected by AT&T. In a very detailed discussion, North Carolina Commission found that "AT&T's proposal to establish only one POI per LATA would force BellSouth to incur additional transport costs to deliver local traffic from every exchange in the LATA to AT&T". (Order, p. 11). The North Carolina Commission also found that AT&T must consider the total cost of the transport arrangement, not just the costs it is asked to incur: "When it chooses the site of the POIs [AT&T] must consider the total of each alternative, not

merely the direct cost, but also those of BellSouth that should properly be assigned to AT&T". (Order, p.11). AT&T strenuously argued that FCC Rule 703(b) prevented BellSouth from assessing transport charges to the SPOI. The North Carolina Commission rejected that argument and specifically concluded that Rule 703(b) does not apply to the question of who pays for transport when the CLEC uses a single point of interconnection architecture. The North Carolina Commission specifically held that "If AT&T interconnects at points within the LATA but outside BellSouth's local calling area from which traffic originates, AT&T should be required to compensate BellSouth for, or otherwise be responsible for transport beyond the local calling area. The Commission further concludes that this holding does not violate any FCC rule or case law and that [it] is more equitable than not and in the greater public interest". (Order, p. 16).

B. THE PROPOSED ORDER IS CONTRARY TO THE LEVEL 3 DECISION

The Proposed Order states that the Commission's holding in the Level 3 Arbitration case compels it to find that CLECs do not have to pay for the additional transport they use in a SPOI architecture. But that is not so. To the contrary, in Level 3 this Commission affirmatively required a CLEC to deploy a *two* POIs in the LATA once the traffic exchanged between the CLEC and Ameritech Illinois exceed an OC-12 level. The Commission acknowledged that the "CLEC need have [only] one POI per LATA" under federal law, but nonetheless required Level 3 to establish a second POI. The Commission found that: "OC-12 represents the appropriate threshold level of traffic before requiring a POI to be established". (Level 3 Arbitration Order Docket No. 00-0223, p. 31). Thus, this Commission has held that even when there is a requirement to permit interconnection at a single point in a LATA, it is equitable to require

[40] In The Matter of Arbitration of Interconnection Agreements Between AT&T Comm. of the Southern States, Inc. and TCG of the Carolinas, Inc. and BellSouth Telecomm, Inc. Pursuant to the Telecom Act of 1996, 2001 N.C.

CLECs to choose between establishing a second POI or paying Ameritech Illinois for additional transport (associated with FX).

C. THE PROPOSED ORDER ERRONEOUSLY REJECTS THE COMPANY'S ARGUMENT THAT CLECS MUST BEAR THE COSTS CAUSED BY THEIR DECISION TO INTERCONNECT AT A SINGLE POINT PER LATA

Section 251(c)(2)(D) requires that the Ameritech Illinois/CLEC interconnection be "on rates, terms and conditions that are just, reasonable and nondiscriminatory." Likewise, Section 801(b)(1) of the Illinois PUA requires that such interconnection be on "just, reasonable, and nondiscriminatory rates, terms, and conditions." As Ameritech Illinois demonstrated in its Initial Brief (pp. 134-39) and its Reply Brief (pp. 65-68), it is plainly just and reasonable for a CLEC to bear the costs caused by its election of a single point of interconnection. And it would just as plainly be unjust and unreasonable, and thus in violation of the 1996 Act and the PUA, to require Ameritech Illinois to bear those costs.

In simple common sense terms, it is only fair that when a CLEC chooses an interconnection architecture that causes additional costs, as a CLEC is doing when it chooses to have a single POI per LATA, the CLEC, rather than the ILEC, should bear those additional costs. The basic rule of fairness is reflected in a familiar economic principle to which this Commission consistently adheres: The cost-causer pays.[41] The basis for the economic principle

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PUC Lexus (N. Car. Utils. Comm'n March 9, 2001).

[41] E.g., Second Notice Order, Adoption of 83 Ill. Adm. Code 550, "Non-Discrimination in Affiliate Transactions for Gas Utilities," Docket No. 00-0586, at p. 5 (July 26, 2001) ("Section 9-101 of the PUA requires all rates to be just and reasonable. In setting just and reasonable rates, the Commission is to assure that the cost of supplying public utility services is allocated to those who cause the costs to be incurred. (See 220 ILCS 1-102(d)(iii).) In order to ensure that cost causers pay, it is incumbent upon the Commission to assure that utilities are reimbursed for services provided to any taker . . ."); Illinois Bell Tel. Co. v. AT&T Corp. and AT&T Comms. of Illinois, Inc., Complaint pursuant to Section 13-514 and Section 13-515 of the Public Utilities Act and request for temporary injunction, Docket No. 97-0624 (February 27, 1998) ("AT&T is purchasing dedicated access from Ameritech and therefore is the customer on behalf of whom Ameritech must obtain space and power for its equipment in AT&T's POPs. As the "cost-causer," AT&T is responsible for compensating Ameritech for these costs"); Arbitration Decision, Covad Comms. Co. and Rhythms Links, Inc. Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Amendment for Line Sharing to the Interconnection Agreement

goes beyond notions of fairness. It is efficient, and therefore in the public interest, for a firm to bear the costs it causes, in order to encourage decisions that reduce costs and, ultimately, the prices paid by the consuming public. And it is demonstrable that a requirement that CLECs bear the additional costs resulting from a single POI architecture will promote efficiency, and that a requirement that Ameritech Illinois bear those costs would promote inefficiency. Ameritech Illinois witnesses Dr. Aron and Mr. Mindell explained why (Am. Ill. Ex. 8.0. pp. 32-36; Am. Ill. Ex. 8.1, pp. 12-16; and Am. Ill. Ex. 6.0, pp. 4-5,9).

It is beyond dispute that a decision to deploy a single switch per LATA by establishing a single POI architecture is also a decision to require additional transport. (Am. Ill. Ex. 6.1, p. 3). There is a trade-off, in other words, between switching costs and transport costs. Consider how a CLEC would look at this trade-off if it were thinking only about calls from one of its end users to another of its end users in the same LATA – in other words, calls that stay on the CLEC's local network. For many such calls, the CLEC would incur greater transport costs if it deploys only one switch in the LATA than if it deploys two switches, each placed near concentrations of the CLEC's end users who are far apart. On the other hand, the CLEC would incur less transport cost (and greater switching cost) if it deploys two switches because it can switch calls between end users close to the second switch without transporting them to a distant switch. In deciding which architecture to use – and this becomes the important point – the CLEC would balance the difference in total switching costs against the difference in total transport costs, and would use whichever architecture minimized total costs. This minimizing of total costs is socially desirable decision-making. (Am. Ill. Ex. 8.1, pp. 14-16).

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with the Illinois Bell Telephone Company d/b/a Ameritech Illinois, and for an Expedited Arbitration Award on Certain Core Issues, Docket Nos. 00-0312 and 00-0313, at p. 63 (August 17, 2000) ("The Commission finds that Rhythms and Covad should pay Ameritech's costs to provide loop qualification information. Rhythms and Covad

Consider next what happens when a CLEC makes the same choice – single POI vs. multiple POI – but taking into account the fact that most calls involving its end users will have an Ameritech Illinois end user at the other end. If the Commission were to resolve the SPOI issue against Ameritech Illinois, CLECs would no longer balance the difference in total switching costs vs. the difference in total transport costs, ***because while CLECs would still bear the same switching costs, CLECs would now bear only a portion the total transport costs*** Accordingly, CLECs would now balance the difference in total switching costs against *only a portion* of the difference in total transport costs.

This is *not* socially desirable decision-making, because the CLEC is looking not at total switching costs vs. total transport costs, but at total switching costs vs. only a portion of total transport costs. Thus, the Proposed Order will give CLECs a socially undesirable incentive – an incentive to make a choice that while minimizing the CLECs costs may increase total system costs and, consequently, the price paid by the consuming public. This is undesirable decision-making from the point of view of the public interest, because, in this scenario, CLECs would choose single POI in all instances *even if the savings in switching costs is modest and the increase in transport costs is enormous.* To give CLECs the proper incentive, *i.e.*, an incentive to consider total system costs, the Commission should resolve the SPOI issue in Ameritech Illinois' favor so that a CLEC has to take fully into account both the switching costs and the transport costs associated with the decision it is making about network architecture. (Another way of saying this is that the Commission should incent CLECs to make the same decision that CLECs and Ameritech Illinois would make together if they were both committed to making a decision that would yield the lowest total cost for both parties.)

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are the "cost causers" and, according to the holding of IUB, the cost of providing such information should be recovered from them").

For all these reasons, the "just and reasonable" terms and conditions for the Ameritech Illinois/CLEC interconnection must require CLECs to bear the additional costs caused by a CLEC's decision to establish a single POI per LATA. A ruling that Ameritech Illinois must bear those costs would be unjust and unreasonable, and would thus violate section 251(c)(2)(D) of the 1996 Act and Section 801(b)(1) of the PUA.

D. CLECs SHOULD PAY AMERITECH ILLINOIS FOR "FX" TRAFFIC TRANSPORTED TO A SPOI

At the very least, the Proposed Order must be modified to permit Ameritech to charge CLECs for the transport of "FX" traffic to a SPOI. "FX" or "foreign exchange" is service where two end users are located in different exchanges, but can still call each other on a local basis. (Am. Ill. Ex. 6.0, p. 11). A CLEC can offer FX service by assigning an NXX code in a way that separates the rating of the call (i.e., V & H coordinates used to determine whether a call is local or toll) from the "routing of the call" (i.e., location where the call actually ends). Using this technique, a CLEC offers a service which allows Ameritech Illinois end users to make toll calls but only pay local rates[42]. (Am. Ill. Ex. 6.0, p. 11). This is not "local" traffic because the CLEC end user receiving the call is not physically located within the same local calling area as the Ameritech Illinois end user placing the call.

Rather than address the issue head on, the Proposed Order avoids it by recommending that the FX issue be deferred to a subsequent docket. The issue can no longer be avoided, however, because the Commission's decision in the Level 3 arbitration to deny Ameritech Illinois the ability to charge for FX transport was based on the fact that the CLEC was required

[42]CLECs offer FX service by assigning, for example, an Aurora telephone number to a customer in downtown Chicago. In this way, an Ameritech Illinois customer in Aurora calls the CLEC customer in Chicago without paying toll charges. (Am. Ill. Ex. 6.0, p. 11). The CLEC is able to sell this capability to Chicago customers that wish to offer free in-bound calling to their end users.

to establish multiple POIs. Level 3 Arbitration, Docket No. 00-0032, Order entered August 30, 2000, pp. 9 and 31.

The only other reason relied in the Proposed Order to deny Ameritech Illinois just compensation – Rule 51.703(b) -- is equally unavailing in the FX context. The FCC's decision in Mountain Communications strongly supports the position that CLECs should pay for the transport of FX traffic to a single POI. There, the FCC's Enforcement Bureau held that the ILEC could recover the cost of dedicated toll facilities that it uses to transport calls made to a carrier's POI from outside of the ILEC's local calling area where the carrier's POI is located. The case warrants detailed discussion.

Qwest, an ILEC, provides interconnection services to Mountain Communications, a CMRS (in this case paging) carrier, and transports calls to Mountain's network. Because a paging carrier's local service areas are often larger than the LEC's, however, a LEC customer who calls a paging carrier's customer may incur a toll charge. A LEC may agree with a paging carrier, however, not to assess toll charges on calls from the LEC's end users to the paging carrier's end users, in exchange for the paging carrier paying the LEC a per-minute fee to recover the LEC's toll carriage costs – a "wide area calling" service. The wide area calling arrangement at issue in the Mountain Communications case involved Qwest's provision of dedicated facilities to Mountain that connect the Direct Inward Dialing ("DID") numbers that Mountain has obtained in each of Qwest's local calling areas to Mountain's interconnection point in another Qwest local calling area. Thus a customer in each of Qwest's local calling areas could dial a local number to reach a Mountain subscriber and avoid incurring toll charges. Id. ¶¶ 3, 11.

Mountain alleged that Qwest should cease assessing any charges associated with the delivery of traffic to Mountain's network. Id. ¶¶ 3, 5, 11. The Enforcement Bureau disagreed: "We agree with Qwest that the provision of dedicated toll facilities by Qwest to enable Mountain to offer its customers a local number in several local calling areas is an optional service that is not necessary for interconnection." Id. ¶ 13.

The arrangement that Mountain unsuccessfully tried to avoid paying for is the same from the calling and called parties' perspectives as an FX service between LECs. In an FX arrangement, the caller avoids paying for what would otherwise be a toll charge, but the LEC serving the caller provides facilities between the switch serving the caller and the distant point of interconnection with the called party's carrier, who provides the called party with a form of free inward calling. The wide area calling arrangement is a convenience to the called party and is an optional service marketed by CLECs; it is not a necessity for interconnection. In Mountain Communications, the FCC has held that 51-703(b) does not prevent an ILEC from charging for transport when a carrier selects an interconnection arrangement that allows it to provide its customers with a toll-free in-bound service. That is exactly what FX service is and accordingly the result should be no different in this proceeding.

E. THE PROPOSED ORDER MUST BE MODIFIED EVEN IF AMERITECH ILLINOIS' POSITION ON THE MERITS IS NOT ACCEPTED

Even if the Commission adopts the recommendation of the Proposed Order on this issue, there are three errors which must be corrected. First, the Proposed Order refers to a pending FCC Notice of Proposed Rulemaking which is examining the apportionment of costs for interconnection. The Proposed Order states that "in the event that the FCC, upon the conclusion of its examination in the NOPR, where to change the 'rules of the road', this Commission would

be willing to reexamine the issue in light of the newly enacted legislation". (Prop. Order at 106). Ameritech Illinois agrees that, if the outcome of the SPOI issue in this proceeding hinges on federal law, and if federal law changes, then this Commission should promptly revise its ruling. Unfortunately, the language in the Proposed Order is somewhat equivocal on this point and merely states that the Commission "would be willing to reexamine the issue". This statement should be more affirmative and the Commission should commit to reviewing and revising its opinion in light of changing federal law. Thus, Ameritech Illinois recommends that the language be revised to state that the Commission will reexamine the SPOI issue and will revise its opinion in the event that federal law changes.

Second, the Proposed Order indicates that the SPOI issue is being considered in the inter-carrier compensation NPRM (Developing a Unified Inter-Carrier Compensation Regime, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd. 9610, 9634-35, 9650-52, paras. 72, 112-114 (2001). In addition, however, the SPOI issue is also currently before the FCC in two other proceedings: 1) A petition for declaratory ruling that has been released for public comments (@ Communications, Inc. Petition for Declaratory Ruling, CC Docket No. 02-4, DA 02-164 (Released January 18, 2002)); and 2) An AT&T complaint case brought against Verizon of Virginia (CC Docket No. 00-251). Accordingly, the Proposed Order should be revised to state that the Commission will reexamine its holding at such time as the FCC resolves the issue in *any* order, regardless of whether it is an order in an NPRM, a complaint case, a declaratory ruling or otherwise.

Third, the following language from the Proposed Order misstates federal law:

> Until such time as the rules change, however, each party to an interconnection agreement regardless of the number of POIs involved should bear the costs of getting traffic to the arrangement and shall not charge the party on the other side any of the costs.

(Proposed Order, p. 106). This language fails to acknowledge that interconnection is used for many optional calling arrangements, like wide area calling and reverse billing, that are not "necessary for interconnection" as that term is used in Mountain Communications and TSR Wireless. To address this shortcoming Ameritech Illinois proposes that the Order be changed to state that "Until such time as the rules change, however, each party to an interconnection agreement regardless of the number of POIs involved shall adhere to FCC Rule 703(b) as applied in the Orders of the FCC and this Commission". In this regard, the Order should also make it clear that Section 4.2 of Ameritech Illinois Tariff 20, Part 23, Section 2 applies to local traffic only and should approve the following additional language for that tariff: "This Section 4.2 does not include FX traffic, wide area calling traffic, reverse billed traffic or any other forms of non-local traffic."

XI. THE PROPOSED ORDER'S FINDINGS ON THE GENERAL TERMS AND CONDITION ISSUE SHOULD BE MODIFIED

Ameritech Illinois agrees with most of the conclusions of the Proposed Order on the General Terms and Condition issues. (Prop. Order, p. 123). There is, however, one aspect of the Proposed Order to which Ameritech Illinois takes exception, i.e., the finding that "Ameritech must remove the phrase 'to the extent not inconsistent with' from its reservation of rights language". (Prop. Order, p. 123). For the reasons set forth below, and as further set forth on pages 151-151 and 153-154 of its Initial Brief, Ameritech Illinois requests that it be permitted to place this language in its tariff.

The proposed tariff states that Ameritech Illinois' obligation to provide UNEs is established by federal law and, "to the extent not inconsistent with the foregoing", state law.[43] This language accurately describes the legal obligations of Ameritech Illinois under Section 13-801(a), in which the Illinois General Assembly expressly recognized that Section 13-801 seeks to regulate issues which are already closely regulated by federal law (e.g., UNEs, collocation, interconnection). Since it is not possible for an ILEC (or any carrier) to comply with contradictory state and federal requirements that apply to the exact same network facilities[44], Section 13-801(a) provides that the state obligations under Section 13-801 are limited to those which are "not inconsistent with" and "not preempted by" federal law. Ameritech Illinois' tariff language properly reflects the Section 13-801(a) requirement that the state law be interpreted consistent with federal law.

The Ameritech Illinois tariff language also accurately reflects its legal obligations under the Supremacy Clause of the United States Constitution. In particular, state laws that "prevent or frustrate the accomplishment of a federal objective… are nullified" by the Supremacy Clause.

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[43] The language appears in several places in the proposed tariff. One example is set forth below :

> Unbundled Network Elements and Number Portability are available to telecommunications carriers for use in the provision of a telecommunications services within the LATA to the telecommunications carrier's end users or payphone service providers as specified and to the extent required by the Telecommunications Act of 1996, Pub. L. No. 104-104, 100 Stat. 56 (1996) ("the Act") and the rules and regulations of the Federal Communications Commission and, to the extent not inconsistent with the foregoing, the IL PUA and the rules and regulations of the Illinois Commerce Commission.
> (Am. Ill. Tariff No. 20, Part 19, Section 1, p.1)

Another passage is as follows:

> The unbundled network element services provided in this section are exclusively for use by "telecommunications carriers" for the provision of telecommunication service as defined by and to the extent required by the Act and, to the extent not inconsistent therewith, the IL PUA.

(Am. Ill. Tariff No. 20, Part 19, Section 1, p.2.1)

[44] For example, it is impossible for Ameritech Illinois to comply with both the federal rule for unbundled local switching (which recognizes that ULS is not always a UNE) and the state rule (which, according to the Proposed Order, recognizes no such exceptions).

Geier, 529 U.S. at 872, 889. In the telecommunications arena, which is so pervasively regulated by both state and federal law, there needs to be a mechanism which draws an appropriate boundary between these competing regulations. The Supremacy Clause serves this role by giving clear priority to federal law. That is properly reflected in the Ameritech Illinois tariff language rejected by the Proposed Order.

XII. THE PROPOSED ORDER'S FINDINGS ON THE REQUEST FOR ADDITIONAL COMBINATIONS ISSUE SHOULD BE MODIFIED

Ameritech Illinois agrees with much of the Proposed Order's treatment of requests for additional combinations. (Prop. Order, pp. 149-150). However, there are two aspects of the Proposed Order to which Ameritech Illinois takes exception: 1) The ongoing notification requirements; and 2) The ability of a CLEC to trigger the BFR-OC process by requesting, on a UNE basis, retail services provided by Ameritech. (Prop. Order, p. 150). For the reasons set forth below, and as further set forth on pages 118-30 of its Initial Brief, Ameritech Illinois requests that these portions of the Proposed Order be modified.

The Proposed Order would require Ameritech Illinois to notify the Commission and the requesting CLEC: 1) "within two days of the referral of any request to the BFR process"; 2) "within two days of the completion of each step in the process"; and 3) within two days of "any denial of any request". (Prop. Order, p. 150). The notice must contain:

1) A complete explanation of the grounds for any denial;

2) The statutory grounds for denial;

3) The factors that went into the decision; and

4) The identity of persons who participated in reaching the decision as well as an indication of who the ultimate decision maker was.

(Prop. Order, p. 150). Ameritech Illinois has several suggestions to streamline and clarify the notification process.

1) Ameritech Illinois should be given three (3) business days to submit the notification. A three (3) business day period still provides extremely prompt notification, but would also give Ameritech Illinois adequate time to accurately provide the detail requested. Two days is not enough time given all of the other time-sensitive obligations which Ameritech Illinois has to meet. The Proposed Order should also clarify that it is referring to business days, and not calendar days. Without this change, notification of a decision reached on Friday would be due on the following Monday – giving Ameritech Illinois just one (1) business day.

2) There should be no requirement to notify the requesting carrier of the "referral of any request of the BFR process" because it is the requesting carrier that issues the request in the first place. The requesting carrier obviously does not need notice that it has initiated its own request.

3) The Proposed Order should clarify that, when it requires notice of the completion of "each step in the process", "each step" refers to the activities identified by Ameritech Illinois which take place at a ten (10) day interval (preliminary read out), a thirty (30) day interval (Phase One readout), and a ninety (90) day interval (Phase Two analysis).

4) A notice of denial should not have to list all the persons who "participated in reaching that decision". That standard is so loose that it could require Ameritech Illinois to identify many, many people — even those who are only tangentially

involved in the process. For example, it could include a field engineer who "participated" in the decision only by providing some data about a particular service configuration. As an alternative, Ameritech Illinois recommends that it identify the person responsible for the decision, i.e., the Ameritech Illinois employee who has been charged with responsibility for this decision and who is empowered to respond to inquiries about the decision. Of course, each CLEC has an Account Manager assigned to it and that Account Manager is responsible for communicating Company information to the CLEC. As a result, the notifications would come from the CLEC's Account Manager, but would also identify the person or persons responsible for the decision.

5) For the same reason, Ameritech Illinois objects to the proposed requirement that the notice of denial indicate the "ultimate decision maker". There is rarely, if ever, a single decision maker in decisions of this nature. Decisions are arrived at in a collaborative fashion between subject matter experts from several groups, including Network, IT, Account Management, Regulatory and Legal. The Proposed Order should recognize this reality by deleting the requirement to identify an "ultimate decision maker" and substituting it with a requirement to identify the "responsible person" for the decision.

Ameritech Illinois also takes exception to the portion of the Proposed Order which would allow a requesting carrier to trigger the BFR-OC process by identifying an Ameritech Illinois retail service, with the demand that Ameritech Illinois identify the sequence of unbundled network elements (if any) comprising that retail service. (Prop. Order, p. 150). Ameritech Illinois has no objection to offering the BFR-OC process which permits CLECs to issue

expedited requests for ordinarily combined UNEs which Ameritech Illinois does not currently offer. (Am. Ill. Initial Brief, p., 130). However, nothing in Section 13-801(d)(3) gives a requesting carrier the ability to request "ordinarily combined" network elements merely by identifying an Ameritech Illinois retail service. Section 801(d)(3), by its terms, limits a CLECs' "request" to a sequence of UNEs. Ameritech Illinois' obligation under Section 13-801(d)(3) is as follows: "Upon request" Ameritech Illinois "shall combine any sequence of unbundled network elements that it ordinarily combines for itself". A common-sense meaning of the term "request" in this context refers to a "sequence of unbundled network elements". In other words, the "request" is for UNEs — not for a retail service.

In further support of this point, Ameritech Illinois notes that it has an independent obligation to offer retail services for resale under Section 13-801(f). The Proposed Order improperly co-mingles the distinct concepts of resale, on one hand, and unbundling, on the other hand. It is imperative that these concepts remain separate, and therefore, CLECs should not be permitted to initiate requests for unbundled network elements by pointing to retail services. If a CLEC wishes to resell a "retail service", it may do so under Section 13-801(f). For these reasons, CLECs should be required to identify the specific unbundled network elements they are requesting when they ask Ameritech Illinois for a new "ordinarily combined" UNE.

XIII. THE PROPOSED ORDER'S FINDINGS ON THE SCHEDULE OF RATES ISSUE SHOULD BE MODIFIED

Ameritech Illinois agrees with most of the conclusions of the Proposed Order on the Schedule of Rates issues. (Prop. Order, p. 155). However, there is one aspect of the Proposed Order to which Ameritech Illinois takes exception, i.e., the finding that "Ameritech's disclaimer relating to the accuracy of the Schedule must be omitted from its tariff." (Prop. Order, p. 155).

For the reasons set forth below, and as further set forth on page 149 of its Initial Brief, Ameritech Illinois requests that it be permitted to place the disclaimer language in its tariff.

The proposed Ameritech Illinois tariff contains the following language:

> Neither this process nor a schedule of rates provided in response to a request (i) constitute an offer to fulfill the proposed order or any indication of whether the Company can actually fill or complete such an order if actually submitted to the Company as an order, or could do so without incurring construction and work activities that might entail additional charges (e.g., a response does not indicate that the Company has checked the availability of facilities or space to determine whether it could accept or complete any such order), (ii) constitute an admission that 220 ILCS 5/13-801(i) applies to any specific request, or (iii) constitute a waiver of any of the Company's rights, or an amendment, a modification of or otherwise affect the provisions of, any applicable tariff or agreement (including the application and interpretation thereof). *In each case, applicable tariffs and agreements control over any schedule of rates provided under this process, including under 220 ILCS 5/13-801(i).* (emphasis added).

As an initial point, Ameritech Illinois believes that only the italicized language is at issue in the Proposed Order. This is the only language that relates to the "accuracy of the schedule" as discussed in the Proposed Order. The non-italicized language explains that a Schedule of Rates quotation is a recitation of tariff of rates and not a representation that the Company has facilities available at the location or that the Company can offer the service in particular location without "special construction" charges. The non-italicized language also states the obvious fact that a Schedule of Rates quotation does not modify in any way an applicable tariff or interconnection agreement. For these reasons, Ameritech Illinois seeks confirmation that this non-italicized language remains in the final tariff.

With respect to the italicized language, the Proposed Order finds that a Schedule of Rates quotation will be binding on Ameritech Illinois even if it is inconsistent with Ameritech Illinois' tariff. That holding is wrong. To begin with, Section 9-240 of the Illinois Public Utilities Act clearly establishes that Ameritech Illinois cannot charge more or less than the rates set forth in its tariffs:

> Charging More or Less Than Published Rates, Except as in this Act otherwise provided, *no public utility shall charge, demand, collect or receive a greater or less or different compensation for any product, or commodity furnished or to be furnished, or for any service rendered or to be rendered, than the rates or other charges applicable to such product or commodity or service as specified in its schedules on file and in effect at the time*, except as provided in Section 9-104, nor shall any such public utility refund or remit, directly or indirectly, in any manner or by any device, any portion of the rates or other charges so specified, nor extend to any cooperation or person any form of contract or agreement or any rule or regulation or any facility or privilege except such as are regularly and uniformly extended to all corporations and persons. (emphasis added).

(220 ILCS 5/9-240)[45]. This section clearly and unambiguously prevents the very conduct which the Proposed Order authorizes, i.e., a Public Utility charging a different rate than the rate set forth in its tariff.

The Proposed Order observes that the "legislature provided no exceptions for inaccurate information" in the Schedule of Rates section. Ameritech Illinois agrees that Section 13-801(i) is silent on the question of whether an inaccurate Schedule of Rates quotation is legally binding even if the rates in the quotation are different than the tariff rates. The silence of Section 13-801(i) on this issue, however, does not mean the General Assembly intended to resolve the issue in the way suggested by the Proposed Order. Rather, pursuant to well-established rules of statutory construction, it means just the opposite. It means that the General Assembly intended to defer to established state law which, in Section 9-240, mandates that the tariff rate be applied in all cases. May 1991 Will County Grand Jury 152 Ill 2d 381, 388 (1992) ("A statute should not be construed to effect a change in settled law of the State unless its terms clearly require such a construction").

The Proposed Order understandably wishes to avoid situations where the Schedule of Rates quotation is different from the tariff, so that the CLEC does not have inaccurate information with which to work. Ameritech Illinois suggests that the way address this issue is to

monitor the situation in order to see whether a problem actually develops. It is not appropriate to address what is, at this point, only a potential problem with a solution which would nullify an important part of the PUA.

In addition, as the Supreme Court noted in AT&T v. Central Office Telephone, Inc., 524 U.S. 214, 188 S. Ct. 1956; 141 L. Ed. 2d 222 (1998), the "filed rate doctrine" (which is embodied in Section 9-240 of the PUA) is really an anti-discrimination provision. In other words, it is a provision which prevents a Public Utility from charging different rates for its services, regardless of whether it has mistakenly quoted tariff rates. By maintaining a strict rule of adherence to tariff rates, there is no possibility that erroneous rate quotations will benefit some customers and disadvantage others. Rather, all customers will get the same tariff prices.

Finally, the Proposed Order sets a potentially dangerous precedent on this point because there is no substantive difference between a rate quotation issued under Section 13-801(i) and a rate quotation which Ameritech Illinois voluntarily gives to a retail customer. To be sure, there are procedural differences under Section 13-801(i) because the quotation: 1) must be given; and 2) must be given within 2 business days. There is, however, no substantive difference in the rate quotation that is actually provided. If, as the Proposed Order suggests, a rate quotation becomes a binding contract which supersedes the tariff, there is no reason why that principle would not apply equally to rate quotations issued to retail customers outside the scope of Section 13-801. Ameritech Illinois recommends that the Commission avoid this pitfall and modify the Proposed Order's holding on this point consistent with the language offered in Attachment A.

[45] The exception discussed in Section 9-104 permits a utility, in cases of emergency, to provide a service that is not covered by tariff.

XIV. THE PROPOSED ORDER'S DECISION TO INCLUDE THE TERM "COMMISSION APPROVED" RATES SHOULD BE REJECTED

Ameritech Illinois takes exception to the Proposed Order's finding that the term "Commission approved" should be inserted before the word "rates" in Ameritech Illinois' proposed tariff as recommended by the Joint CLECs. (Prop. Order, pp. 168-69). The Proposed Order erroneously states that "no other party addressed this issue on brief, from which the Commission infers no objection to its inclusion in Ameritech Illinois' tariff". (Prop. Order, p. 169). In fact, Ameritech Illinois addressed this issue on pages 81 and 82 of its Initial Brief and strongly objected to the inclusion of the words "Commission approved" in front of the word "rate" wherever it appears in the Ameritech Illinois ULS-ST tariff[46].

The Public Utilities Act clearly defines when Ameritech Illinois has "established an effective rate" in its tariff. Section 9-201(b) provides, in relevant part:

> All rates or other charges, classifications, contracts, practices, rules or regulations not so suspended shall, on the expiration of 45 days from the time of filing the same with the Commission, or of such lesser time as the Commission may grant, *go into effect and be the established and effective rates or other charges, classifications, contracts, practices, rules and regulations*, subject to the power of the Commission, after a hearing had on its own motion or upon complain, as herein provided, to alter or modify the same.

(220 ILCS 5/9-201(b)). This establishes that rates filed with the Commission and not suspended by the Commission "*shall… go into effect and be the established and effective rates*" of Ameritech Illinois. As discussed above, under Section 9-240, Ameritech Illinois must charge those "established and effective rates". Stated differently, once a Public Utility files tariffed

[46] In at least two places, the Joint CLECs propose to insert the term "Commission approved" where it simply makes no sense. For example, the Joint CLECs propose the following changes (shown in legislative style): "The ULS-ST Blended Transport rate is based upon a Commission approved amalgamation of direct and tandem routed traffic". Jt. CLEC Ex. 1, Sch. JPG-1, Part 19, Section 21, Sheet 36). The insertion of the words "Commission approved" appear to require approval of the "amalgamation of direct and tandem" traffic and makes no sense whatsoever. The Proposed Order should make it clear that this aspect of the Joint CLEC proposal is not adopted.

rates with the Commission and once those rates go into effect, those tariff rates are not only legally authorized – they are legally required.

The Proposed Order concludes that the only effective rates in the tariff are those which are "Commission approved". It appears from the Proposed Order that rates are only "Commission approved" after suspension, investigation and a hearing. The Proposed Order, therefore, imposes a requirement which nullifies Section 9-201(b).

It is completely unnecessary to reach such an extreme result. The Commission has unquestioned authority under Section 9-201(b) to suspend and investigate any Ameritech Illinois tariff filing. If the Commission is concerned that a proposed Ameritech Illinois rate is not appropriate, it need only exercise its authority to suspend and investigate the rate. At the conclusion of such proceeding, the resulting rate will surely, by any definition, be "Commission approved", thus meeting all possible concerns raised by the Joint CLECs in this proceeding. It is, therefore, completely unnecessary (and violative of Illinois law) to require that the only effective rates in Ameritech Illinois' tariffs are those that have been "Commission approved". For this reason, the Commission should reject this portion of the Proposed Order.

XV. THE PROPOSED ORDER'S DECISION TO ADOPT STAFF'S LANGUAGE DEALING WITH PRESUBSCRIPTION AND PIC CHANGES SHOULD BE REJECTED

In accordance with Section 13-801(d)(6), the Company included language in its proposed UNE-P tariff which provides that, in the absence of a contrary agreement, "as of 12:01 a.m. on the third business day after placing an order for a preexisting UNE-P, the requesting telecommunications carrier shall be the presubscribed primary local exchange carrier for the end user line and shall be entitled to receive, or direct the disposition of, all revenues for all local

exchange and access services that utilize the unbundled network elements in that preexisting UNE-P, unless it is established that the end user of the existing local exchange service did not authorize the requesting telecommunications carrier to make the request." (Am. Ill. Ex. 1.0, Attachment 1.2, p. 29; Am. Ill. Ex. 2.0, p. 26). The Proposed Order (pp. 170-71) adopts two revisions to the above quoted language which were recommended by Staff. Ameritech Illinois takes exception to both revisions.

First, the Proposed Order deletes the words "all local exchange and access services," and substitutes the word "telecommunications" before the word "services." The Proposed Order concludes that inclusion of the word "telecommunications" should "resolve any concerns of Ameritech" that the tariff language might be interpreted to permit CLECs to receive, or direct the disposition, of revenues related to non-telecommunications services. The Proposed Order, however, fails to address another significant concern which is addressed by Ameritech Illinois' use of the words "all local exchange and access services." Specifically, without Ameritech Illinois' clarifying language, the tariff might be construed as entitling the CLEC requesting the platform to receive, or direct the disposition of, revenues applicable to telecommunications services (such as interLATA toll or, in some cases, intraLATA toll) which utilize network elements within the platform, but which are not provided by Ameritech Illinois or the requesting CLEC. Ameritech Illinois cannot control or direct payments that the end user makes for such services to the CLEC requesting the platform. Accordingly, the Company's proposed tariff language appropriately clarifies that Ameritech Illinois' obligation in this regard is limited to "local exchange and access" services. (Am. Ill. Ex. 2.1, p. 21).

Second, the Proposed Order also accepts Staff's proposal to remove the word "preexisting" from the Company's proposed tariff language. This change should also be

rejected. When Ameritech Illinois provides to a CLEC a new UNE-P combination (i.e., a combination that is not preexisting and being used to serve a customer at the time of the CLEC's order), the Company would not be (nor would have been) billing the CLEC's end user for any "services." Accordingly, the requirement that a CLEC be entitled to receive or direct the disposition of revenues from services utilizing the platform has no applicability to a new UNE-P combination. (Am. Ill. Ex. 2.1, p. 22).

The Proposed Order concludes that the inclusion of the word "preexisting" is not necessary because "even assuming Ameritech is correct that, for new UNE-P combinations, CLECs would be billing the end user for services, then Ameritech's language is needlessly limiting since for new UNE-P combinations, Ameritech would clearly be permitting CLECs to receive or direct the disposition of revenues from services utilizing the platform and thus, would always be in compliance with the requirements of Section 13-801(d)(6)." (Prop. Order, p. 170). The Proposed Order's analysis misses an important point. The provision of Section 13-801(d)(6) which permits a CLEC to receive or direct the disposition of revenues from services utilizing the network elements platform after three days is clearly tied to the requirement of that Section which provides that, where field work outside of the central office is not required, the Company must provide the requesting CLEC with the ordered preexisting UNE platform within three business days for at least 95% of the orders for each requesting CLEC for each month. The time period for the provisioning of new UNE-P combinations, however, may vary from three days depending upon the established provisioning interval of the particular network elements that comprise the platform.

For example, consistent with the UNE loop provisioning intervals affirmed by the Proposed Order, Ameritech Illinois could have seven or ten days to provision a new UNE-P

depending upon the number of loops involved. (Am. Ill. Ex. 10.0, pp. 3-4; Prop. Order, pp. 165-66). In that situation, there would be no basis for the requesting CLEC to argue that it is entitled to revenues generated by services utilizing the network elements of the new UNE platform within three days after the order when Ameritech Illinois is not required by the statute to complete the provisioning of such new UNE-P prior to seven or ten days. To remove any ambiguity on this issue, however, the word "preexisting" should be included in the tariff language governing the CLEC's right to receive or direct the disposition of revenues.

XVI THE PROPOSED ORDER MUST CLEARLY STATE THAT IT ONLY APPLIES TO INTRASTATE SERVICES

It is axiomatic that neither the Illinois General Assembly nor this Commission could issue an order that impacts *interstate* services. By definition, The PUA and the Commission can only regulate *intrastate* services. Interstate services are subject to the exclusive jurisdiction of the FCC. Citizens' Utility Board v. Illinois Commerce Commission, 315 Ill. App. 3d 928; 735 N.E.2d 92, 98 (3d Dist. 2000). Accordingly, each and every issue addressed by the Proposed Order is limited to intrastate services only.

It is important for the Commission to make this specific finding. This case involves closely intertwined issues of federal and state law as they relate to interconnection, collocation and access to UNEs. As the briefs and the Proposed Order illustrate, most questions that arise under Section 13-801 inevitably result in a review of the inter-relationship between federal and state law on the issue. While the parties may disagree on the relative importance of state and federal law as it relates to any given issue, there should be no doubt that Section 13-801 and the Proposed Order apply only to intrastate services.

XVII. CONCLUSION

For all of the reasons set forth in this Brief on Exceptions, Ameritech Illinois respectfully requests that the Commission modify the Proposed Order as set forth herein and the attached Exceptions.

Date: April 1, 2002

Respectfully submitted,

ILLINOIS BELL TELEPHONE COMPANY

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CERTIFICATE OF SERVICE

I, Karl B. Anderson, an attorney, certify that a copy of the foregoing **BRIEF ON EXCEPTIONS AND EXCEPTIONS OF AMERITECH ILLINOIS** was served on the parties on the attached service list by electronic transmission on April 1, 2002 and U.S. Mail on April 2, 2002.

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